PUBLIC POLICY CONSIDERATIONS IN EU COMPETITION LAW

University of Helsinki

Faculty of Law

Master's Thesis in EU Law

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Tiivistelmä – Referat – Abstract

Public policy considerations have had a varying degree of impact in EU competition law. Throughout the years, the European Commission has allowed for certain public policy considerations, such as the protection of the environment and employment, but "the more economic approach" of the early 21st century has marked a turning point in this regard. Economic analysis has since the late 1990s become an increasingly important part of competition analysis and enforcement, and the focus on economic parameters has led to a more cautious attitude towards public policy interests. Despite the advantages that the more economic approach has given to EU competition law, some argue that it has led to an overly price-centric approach to consumer welfare.

Competition policies on a global scale are affected by different underlying economic theories. The varying economic and theoretical approaches can be classified into different schools of thought, which affect the underlying presumptions of how competition in the market is achieved. Antitrust law in the United States has been affected mainly by the Chicago and Harvard schools of thought, both of which have also affected the development of EU competition law. However, EU competition law can also be perceived as its own, distinct school of thought, namely the European school of thought.

The purpose of this thesis is to assess public policy considerations in light of the European school of thought and its theoretical framework. The research question entails several different themes. Public policy considerations are first studied with case law and sustainability is highlighted as a recent and relevant example. In addition to public policy considerations, another essential theme to this thesis is the different schools of thought affecting competition law and policy. By studying the European school of thought and the social market economy, this thesis aims to emphasise the sui generis features of EU competition law. As the notion of social market economy implies that competition law should consider societal concerns as well, a relevant question in this regard is whether competition law should be interpreted coherently with the totality of EU law. In other words, this is a question of whether competition law should remain independent of the totality of EU law, or whether EU-wide goals and values should be accommodated in competition law as well. This thesis also studies the possibility of a broader conception of consumer welfare, mainly by analysing "the fair share of the benefits" and the concept of consumer well-being.

The research question is contemplative by nature, and so are the conclusions of this thesis. A primary issue in studying this topic is that the objectives and priorities of EU competition law remain somewhat unclear. A central notion in this regard is the dichotomy between the Commission and the European Court of Justice, as they have given somewhat differing notions on the objectives of competition law. As for the European school of thought, a central notion is that EU competition law is embedded in a framework that is fundamentally different from the Chicago school of thought. The concept of the social market economy, together with Article 3 TEU and Articles 7 and 11 TFEU, suggest that the theoretical foundations for considering public policy interests in competition law exist. Studying the possibility of long-term consumer welfare, benefits to the society as a whole and the concept of consumer well-being, demonstrate that the economically oriented notion of consumer welfare is perhaps too narrow in the context of the social market economy. All in all, the question of public policy considerations in EU competition law is ultimately perceived as a question of including fundamental values and objectives of the Union in competition law and policy.

Avainsanat – Nyckelord – Keywords
European Union; competition law; European school of thought, social market economy; public policy; consumer welfare; consumer well-being

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Tiivistelmä – Referat – Abstract

Valtion politiikoilla, eli niin sanotuilla ”public policy” -näkökohdilla on ollut vaihteleva merkitys EU:n kilpailulainsäädännössä. Euroopan komissio on vuosien varrella ottanut huomioon tiettyjä valtion politiikkoja, kuten ympäristönsuojelun ja työllisyyden, mutta 2000-luvun alkupuolella alkanut kilpailuoikeuden modernisaatio ja niin sanottu ”the more economic approach” on merkinnyt käännekohtaa public policy -tavoitteille. Taloudellisesta analyysista on 1990-luvun lopusta lähtien tullut yhä tärkeämpi osa kilpailuoikeutta, ja keskittyminen taloudellisiin parametreihin on johtanut siihen, että suhtautuminen public policy -tavoitteisiin on muuttunut varautuneemmaksi. Vaikka taloudellisen analyysin hyödyntäminen kilpailuanalyysissa tuo mukanaan huomattavia etuja, jotkut katsovat, että tämä on johtanut liian hintakeskeiseen tapaan mitata kuluttajien hyvinvointia.

Eri maiden kilpailupolitiikkojen taustalla vaikuttavat erilaiset talousteoriat. Vaihtelevat taloudelliset ja teoreettiset lähestymistavat voidaan luokitella talousteorian koulukuntiin, jotka vaikuttavat olettamuksiin siitä, miten kilpailu markkinoilla toimii. Yhdysvaltojen kilpailulainsäädäntöön ovat vaikuttaneet pääasiassa Chicagon ja Harvardin koulukunnat, joista molemmat ovat vaikuttaneet myös EU:n kilpailulainsäädännön kehitykseen. EU:n kilpailuoikeus voidaan kuitenkin hahmottaa myös omana, erillisenä koulukuntanaan, eli eurooppalaisena koulukuntana.

Tutkielman tarkoituksena on arvioida public policy -näkökohtia eurooppalaisen koulukunnan ja sen teoreettisten raamien valossa. Tutkimuskysymykseen liittyy useita eri teemoja. Public policy -näkökohtia tutkitaan ensin oikeuskäytännön avulla ja kestävä kehitys nostetaan esille ajankohtaisena esimerkkinä. Public policy -tavoitteiden lisäksi tämän tutkielman keskeinen teema on kilpailuoikeuteen vaikuttavat erilaiset koulukunnat. Tutkielman tarkoituksena on korostaa EU:n kilpailuoikeuden *sui generis* -luonnetta tutkimalla eurooppalaista koulukuntaa ja sosiaalista markkinataloutta. Koska sosiaalisen markkinatalouden käsite viittaa siihen, että kilpailuoikeudessa tulisi ottaa huomioon myös yhteiskunnalliset näkökohdat, oleellinen kysymys tässä yhteydessä on se, pitäisikö kilpailuoikeutta tulkita koherentisti koko EU-oikeuden kanssa. Tutkielmassa siis pohditaan, pitäisikö kilpailuoikeutta tulkita muusta EU:n oikeudesta itsenäisenä oikeudenalana, vai pitäisikö EU:n laajuiset tavoitteet ja arvot ottaa huomioon myös kilpailuoikeudessa. Tutkielmassa pohditaan myös, voisiko kuluttajien hyvinvoinnin käsitettä tulkita laajemmin. Tämän osalta relevanttia on tutkia, miten kuluttajille allokoituva ”kohtuullinen osuus hyödyistä” voitaisiin käsittää laajemmin, ja miten kuluttajien hyvinvointia kuvaavat käsitteet ”consumer welfare” ja ”consumer well-being” poikkeavat toisistaan.

Sekä tutkimuskysymys että tutkielman johtopäätökset ovat luonteeltaan pohdiskelevia. Merkittävä haaste aiheen kannalta on se, että EU:n kilpailuoikeuden tavoitteet ja prioriteetit ovat edelleen hieman epäselviä. Tähän vaikuttaa muun muassa komission ja EU:n tuomioistuimen välinen kahtiajako, sillä molemmat tahot ovat tuoneet esille erilaisia käsityksiä kilpailuoikeuden tavoitteista. Eurooppalaisen koulukunnan osalta keskeinen havainto on se, että EU:n kilpailuoikeudella on perustavanlaatuisesti erilaiset teoreettiset lähtökohdat kuin Chicagon koulukunnalla. Sosiaalisen markkinatalouden merkitys, SEU:n 3 artikla sekä SEUT:n 7 ja 11 artiklat viittaavat siihen, että public policy -tavoitteiden huomioimiselle EU:n kilpailuoikeudessa on olemassa teoreettiset edellytykset. Tutkimalla kuluttajien hyvinvointia pitkällä aikavälillä, koko yhteiskunnalle kertyviä hyötyjä sekä consumer well-being -käsitettä, tutkielmassa havaitaan, että liialti hintoihin ja taloudellisiin parametreihin keskittynyt käsitys kuluttajien hyvinvoinnista vaikuttaa olevan liian kapea sosiaalisen markkinatalouden kontekstissa. Loppujen lopuksi tutkielmassa todetaan, että tutkimuskysymykselle relevantti kysymyksenasettelu on se, pitäisikö EU:n perustavanlaatuiset arvot ja tavoitteet ottaa huomioon EU:n kilpailuoikeudessa.

Avainsanat – Nyckelord – Keywords
Euroopan unioni; kilpailuoikeus; Eurooppalainen koulukunta; sosiaalinen markkinatalous; politiikka; kuluttajien hyvinvointi

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Abbreviations

ACM	the Netherlands Authority for Consumers and Markets
EC	European Community
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESM	European Social Model
EU	European Union
OECD	Organisation for Economic Co-operation and Development
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations

1. Introduction

1.1 Background and Research Questions

The European Union has a unique and dynamic legal system, which has shaped itself throughout history and continues to develop hand in hand with the economic, societal, cultural, and political changes in Europe. Similarly, competition policy has developed in accordance with these changes. One element of competition law, which has changed remarkably throughout the years, is the role of public policy considerations. A central element to this thesis is to study the current goals of EU competition law against its theoretical and economic background and contemplate a wider conception of the different goals that competition law could pursue.

Public policy considerations have had a varying degree of impact in EU competition law. Throughout the years, the European Commission has allowed for certain public policy considerations, such as the protection of the environment and employment, but "the more economic approach" of the early 21st century has marked a turning point in this regard. Economic analysis has since the late 1990s become an increasingly important part of competition analysis and enforcement[1], and the focus on economic parameters has led to a more cautious attitude towards public policy interests. Despite the advantages that the more economic approach has given to EU competition law, some argue that it has led to an overly price-centric approach.[2] The Green Deal, together with the rising awareness of climate change, has sparked discussion regarding the role of sustainability considerations in competition law.[3] Another topical concern is the rise of tech giants and the intersection between privacy and competition law.[4] In addition to specific multidisciplinary interests, some argue that EU competition law should hold on to its ordoliberal roots and thus promote societal goals as well.[5]

[1] See the Commission's White Paper on modernisation of the rules implementing Articles 85 and 86 of the Treaty, paragraph 78, according to which "the Commission will adopt a more economic approach to the application of Article 85(1), which will limit the scope of its application to undertakings with a certain degree of market power". See also Van den Bergh 2018, p. 13.
[2] Wasastjerna 2019, p. 92.
[3] See e.g. Volpin 2020, p. 10 and Holmes 2020b, p. 255.
[4] For an insightful analysis of the role of personal data and privacy in competition law, see Maria Wasastjerna's doctoral thesis: Competition, Data and Privacy in the Digital Economy: Testing Conventional Boundaries and Expanding Horizons - Towards A Privacy Dimension in Competition Policy?
[5] Gerbrandy 2019, p. 127.

Competition policies on a global scale are affected by different underlying economic theories. The varying economic and theoretical approaches can be classified into different schools of thought. Two large players in the global competition field are the European Union and the United States, both representing underlying ideas of different schools of thought.[6] Due to their differences in competition policy, it is central to this thesis to study the characteristics of the European school of thought, especially from the perspective of public policy considerations. By analysing the European school and comparing it to the Chicago school, it will be argued that competition law in the EU is based on a fundamentally different framework. Furthermore, this thesis will contemplate whether the theoretical foundations of the European school of thought imply and encourage a more holistic approach to competition law.

My research question, broadly described, is about the role of public policy considerations in EU competition law. The approach is rather theoretical – the idea of public policy considerations is analysed from the perspective of the European school of thought and the social market economy. More accurately, the purpose of this thesis is to *assess public policy considerations in light of the European school of thought and its theoretical framework.* The assessment behind the research question also entails the question of whether competition law should be interpreted in *an isolated or a holistic manner*. In other words, I will study whether competition law should be somewhat independent of the totality of EU law, or whether EU-wide goals and values should be accommodated in competition law as well. I consider this as a complementary question embedded in the discussion of public policy considerations.

What is the current role of public policy considerations in EU competition law, and how do we define public policy considerations? It should be noted that the aim of this thesis is not to provide a clear-cut definition of public policy considerations. Instead, I have chosen to interpret public policy considerations rather widely, in order to assess the research question comprehensively. Furthermore, this thesis is not intended to analyse each public policy interest in detail, although I will use case law to provide concrete examples and highlight sustainability as a recent public policy concern. The research questions are contemplative by nature, and thus the aim of this thesis is not to provide a yes-or-no answer. Due to the scope and the theoretical approach chosen for this thesis, it is more relevant to study *the possibility of public policy considerations* within the European school's theoretical framework, i.e. on a more abstract level. Under this approach, I will emphasize the fact that competition law is facing more non-

[6] Hildebrand 2016, p. 6.

competition and non-economic interests, and that the theoretical foundations of the European school of thought not only allow, but encourage, for considering such interests.

1.2 Methodology and Sources

Legal dogmatics is a logical starting point for a methodological approach, as this thesis studies current EU competition policy. Legal dogmatics is used to interpret and systematise legal norms – to simplify, it studies law currently in force.[7] Two distinctions can be made in this regard, as legal dogmatics entails a practical and a theoretical approach. The *practical approach* aims to interpret and clarify the meaning of different legal texts.[8] The central idea in the *theoretical approach* to legal dogmatics is to develop the general doctrines in a certain area of law. General doctrines depict the theoretical core that is discussed within the academic community, and not necessarily produced by the legislature or judiciaries. Concepts, principles and theories form the essential ingredients of general doctrines. They have multiple functions, one of which is to depict the legal order as systematic and consistent.[9]

The distinction between the practical and theoretical approach to legal dogmatics is not always necessary, as these approaches often complement each other and are intertwined.[10] Furthermore, the theoretical approach may be linked to *legal theory*, as they often contemplate similar questions.[11] In this thesis, both the theoretical and practical approach to legal dogmatics are necessary in order to assess public policy considerations from the perspective of the European school of thought. However, more emphasis is given to the theoretical use of legal dogmatics, which is why it is useful and informative to make the distinction between the two approaches here. This thesis reflects on fundamental concepts and theories, such as the social market economy, consumer welfare, and coherence, and studies the theoretical background of EU competition law, namely the European school of thought.

The study of EU (competition) law should also be given some methodological consideration. Raitio emphasizes a contextual approach, which is compatible with the multinational and dynamic nature of the EU. For example, legal theory, legal history and political science may

[7] Hirvonen 2011, p. 22.
[8] Määttä et al. 2018, p. 20.
[9] Ibid., p. 22.
[10] Ibid., p. 21.
[11] Ibid., p. 24.

enrich the research results and provide a deeper understanding of the subject. In addition, economic considerations may prove especially useful for research regarding EU competition law and the single market.[12] Furthermore, many essential concepts of competition law are based on competition theory and economics, which might blur the boundaries of competition law as a *legal* subject.[13]

My method of choice is legal dogmatics with an emphasis on the theoretical approach. Following the contextual approach to EU law, some multidisciplinary notions from legal theory and political science are used to provide a more comprehensive analysis. Similarly, economic and comparative notions are used in a complementary fashion, to give a more accurate analysis of the schools of thought and the differences between them. I believe this approach will provide contextual insights and enrich the analysis of the topic. This approach is beneficial to address my research question, which is quite contemplative and multidimensional by nature.

As for the sources used in this thesis, legislation is an essential feature of almost any legal thesis. Case law has a central role as well, and this is partly due to the nature of EU competition law. EU competition law often includes "open" terminology. The concrete implications of a certain concept are usually established in judicial decisions, which is why case law is an especially significant source of law. The systematic and teleological method of interpretation in EU law views the legal norm in the context of the wider legal system, taking into account the objectives of said legal norm.[14] Studying the different schools of thought and theoretical concepts, such as coherence, requires significant use of legal literature as well. As this topic contemplates on questions of competition policy, reports and other policy documents of different institutions of the EU and other entities are also relevant sources.

1.3 Terminology

Competition law and *antitrust law* are often used synonymously, mostly so that antitrust law refers to American laws and competition law refers to EU competition law. The European Commission has also used the word 'antitrust' when referring to anticompetitive practices and abuse of dominance.[15] For the sake of clarity, this thesis has a simple approach: antitrust law is

[12] Raitio 2006 p. 815. Kangas represents a somewhat similar approach, as he describes jurisprudence as methodologically flexible, being often exposed to multiple methods. See Kangas 1997, p. 91.
[13] Kuoppamäki 2003, p. 23-25.
[14] Ibid., p. 23-25.
[15] Jones - Sufrin - Dunne 2019, p. 4.

used to refer to American antitrust law, and competition law thus refers to EU competition law (and any other competition law regime, if such are mentioned).

As *competition policy* is a central theme, it is important to define and use the terminology in a logical and clear way. Competition policy is used to refer to the elements that define competition law and guide its application and interpretation. To clarify the terminological differences, "competition law can be described as the means by which competition policy is implemented".[16]

The single market, *internal market*, and *common market*, all refer to the EU's goal of market integration. By removing regulatory barriers, EU Member States are intended to form a single European market. The underlying idea behind the single European market is often perceived to be economic integration, but the single market also entails a social and political dimension.[17] This thesis mainly uses the terms single market and internal market.

1.4 Structure

The next chapter is an introduction to EU competition policy and the various objectives suggested to EU competition law. Chapter 3 includes brief remarks on the definition of public policy considerations, as well as examples from case law. It will also introduce sustainability as a recent and noteworthy example of public policy considerations and contemplate on the principle of legal certainty. Chapter 4 will introduce the economic and theoretical framework central to this thesis, including the different schools of thought and the underlying economic theories in competition law. The main focus is on the European school of thought and the concept of the social market economy. The chapter will also introduce the Harvard and Chicago schools of thought, both of which have affected EU competition law. Chapter 5 studies a central issue of this thesis, namely whether competition law should be regarded as an isolated area of law, or in light of the wider values and objectives of the European Union. Central to this question is chapter 5.1, which studies coherence in competition law. Chapter 5 will also combine certain elements of chapters 3 and 4, analysing inter alia consumer well-being and "the fair share of the benefits", as well as the role of economic theories in a society that pursues multiple values and objectives. Chapter 6 provides some concluding thoughts on the topic.

[16] Jones - Sufrin - Dunne 2019, p. 2.
[17] Chalmers - Davies - Monti 2019, p. 626.

2 Competition Policy in the European Union

2.1 Competition in the Founding Treaties

On a fundamental level, the European Union aims to "promote peace, its values and the well-being of its peoples."[18] The pursuit of an internal market is described in Article 3(3): "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, *a highly competitive social market economy*, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance."

Protocol No. 27 of TEU contains the principle of undistorted competition. The Union has exclusive competence in competition matters, which means that it has the exclusive right to establish "the competition rules necessary for the functioning of the internal market".[19] The Treaty provisions relevant to competition include Article 101 (restrictive agreements), Article 102 (abuse of a dominant position), Article 106 (public undertakings and undertakings with special or exclusive rights) and Articles 107 to 109 (unlawful state aid) TFEU.

For public policy considerations, a relevant Treaty provision is Article 7 TFEU, according to which "[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers." The requirement of consistency is further clarified and strengthened by Article 11, which requires that "[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development."[20]

[18] Article 3(1) TEU. These values, according to Article 2 TEU, include the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.
[19] Article 3(1)b TFEU.
[20] Similar notions exist regarding e.g. social aspects (Art. 9) and consumer protection (Art. 12).

2.2 Development of EU Competition Policy

"To define competition policy (or antitrust policy as it is more often called in the US) is not an easy task. A possible definition might be as follows: "the set of policies and laws which ensure that competition in the marketplace is not restricted in a way that is detrimental to society".[21]

A small history lesson on EU competition policy is in place for several reasons. First and foremost, the development of EU competition policy emphasises the fact that policies change over time and are truly contextual. Competition law has focused on multiple different policy goals over the years, some of which have been controversial in their ability to protect competition. Despite the parade of consumer welfare during the last decade, the history of EU competition policy is depicted by occasional inconsistencies.[22]

Before the Lisbon Treaty, there seemed to be a consensus on the fact that public policy interests were often recognised and considered in interpreting Article 81(1) EC (current Article 101 TFEU).[23] However, when the Lisbon Treaty came into force, the view of competition specialists had already started to shift. The aftermath of EU competition law's modernisation included a growing tendency to separate competition law from the totality of EU law. To simplify, the new preference of competition professionals was to separate EU-wide socio-political interests from competition law.[24]

At the turn of the 21st century, EU competition law went through a comprehensive modernisation process. A new institutional structure as well as new procedures were introduced by the Commission in 2004.[25] The most significant change is most likely Regulation 1/2003, according to which the enforcement of Articles 101 and 102 of TFEU was decentralised. Decentralisation gave both the Commission and national competition authorities the competence to apply the competition rules.[26] Gerber views that two separate (yet interlinked) modernisation processes took place during this time, as the procedural modernisation was accompanied by substantial modernisation. The substantial change is known as "the more

[21] Motta 2004, p. 30.
[22] Whish - Bailey 2018, p. 19.
[23] Townley 2009, p. 2. See also Monti 2007, p. 90 and Faull - Nikpay 2007, p. 186-188.
[24] Ibid., p. 2.
[25] Gerber 2008, p. 1235.
[26] Doorn 2015, p. 19.

economic approach", whereby economics became central in defining the goals and methods of competition law.[27]

Both modernisation processes are significant to public policy considerations in the EU. The significance of these changes cannot be ignored. In fact, Goyder et al. view EU competition policy to have "changed out of all recognition" after the modernisation.[28] Before the decentralisation of competition enforcement, the Commission had more discretion to apply pubic policies and it did on several occasions balance other EU policies against economic efficiency. However, decentralisation has become somewhat of an obstacle for public policy considerations. Jones et al. imply that it would not be feasible for both the Commission and national authorities to have such discretionary powers.[29]

Before the modernisation, EU competition law embraced the ideas of *ordoliberalism*, which emphasises the importance of individual economic freedom. Partly due to this approach, competition policy was considered by many to be too interventionist. The Commission responded to this criticism with the modernisation package. From a theoretical point of view, modernisation took EU competition policy from ordoliberalism towards neo-classical economics. It is considered to have brought EU competition policy towards U.S. antitrust law.[30] Another way to describe this shift is that a formalistic competition assessment turned into a more effects-based approach.[31]

Despite the colourful history of EU competition policy, it is by no means implied that this development process should be criticised. As Whish and Bailey have aptly stated, "*competition policy does not exist in a vacuum*: it is an expression of the current values and aims of society and is as susceptible to change as political thinking generally."[32] This remark is not just an accurate description of the nature of EU competition policy – it also emphasizes the importance of a contextual approach to the study of EU competition law, which is pursued in this thesis.

[27] Gerber 2008, p. 1247.
[28] Goyder – Goyder - Albors-Llorens 2009, p. 630.
[29] Jones - Sufrin - Dunne 2019, p. 50-51.
[30] Doorn 2015, p. 20-21. See also Gerber 2008, p. 1247.
[31] In general, a formalistic approach may consider certain conduct as illegal per se, whereas an effects-based approach concentrates on the effects of the conduct. See Bartalevich 2016, p. 103.
[32] Whish - Bailey 2018, p. 19.

2.3 The Objectives of EU Competition Law

2.3.1 Introduction

As the EU Treaties do not include a detailed explanation of the goals that EU competition rules pursue, case law has had a significant role in clarifying these goals.[33] The Commission's so-called General Guidelines point out two significant goals, stating that the objective of Article 101 TFEU is to protect competition as a means of "enhancing *consumer welfare* and of ensuring an *efficient allocation of resources*."[34] The rulings of the ECJ suggest that competition law also aims to protect the structure of the market and competition as such."[35] Various goals have been advocated in legal literature. In addition to consumer welfare and efficiency, the various suggested objectives include freedom of choice, economic freedom, fairness, as well as protecting the market structure.[36] Ultimately, competition is believed to ensure low prices, product quality and variety, innovation and output of products, and this premise is the backbone of many competition rules.[37] Lastly, the single market is an essential goal of the EU, upon which competition law has a significant role.[38]

From an economically oriented perspective, the goals of EU competition law could be divided into the integration goal and the economic goal.[39] A more nuanced characterisation is suggested by Ezrachi, who depicts the goals of EU competition law to be centred around consumer welfare. This primary objective is supported by effective competition structure, efficiency and innovation, fairness, consumer well-being, plurality and economic freedom, as well as market integration.[40]

An attempt to define the objectives of EU competition law is complicated by a dichotomy between the Commission and the ECJ. While the Commission has actively contributed to the development of EU competition law and policy, its statements regarding the objectives of

[33] Barnard - Peers 2014, p. 506.
[34] Commission General Guidelines 2004, para. 13.
[35] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline,* ECLI:EU:C:2009:610, para. 63. See also C-8/08 *T-Mobile Netherlands,* ECLI:EU:C:2009:343, para. 38, and C-68/12, *Slovenská sporiteľňa*, ECLI:EU:C:2013:71, para. 18.
[36] Wasastjerna 2019, p. 79-80.
[37] Whish - Bailey 2018, p. 5.
[38] Jones - Sufrin - Dunne 2019, p. 43-44.
[39] The integration goal is rather self-explanatory, and the economic goal refers to effective competition. See Bishop - Walker 2010.
[40] Ezrachi 2018, p. 4.

competition law have emphasised economic effects, whereas the ECJ has not confirmed this approach.[41] This dichotomy is visible in the *GlaxoSmithKline* case, where General Court stated that competition rules aim to prevent undertakings from "reducing the welfare of the final consumer of the products in question" and mentioned that the Commission's evaluation was based on the same approach.[42] The ECJ opposed this view by stating that neither Treaty provisions nor case law supports the Commission's view. Instead, the Court concluded that competition rules aim to "protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such."[43] The various objectives suggested to EU competition law are assessed below, with a focus on efficiency and consumer welfare.

2.3.2 Efficiency and Effective Competition

Efficiency gains can justify an otherwise anti-competitive agreement, if it fulfils the requirements set in Article 101(3) TFEU. The efficiency gains mentioned in Article 101(3) are intended to cover all objective *economic efficiencies*, and they may be cost efficiencies or qualitative efficiencies, which refer to e.g. product quality and product variety.[44] Similarly to this provision, the conduct of a dominant undertaking (Article 102 TFEU) may be justified if it produces substantial efficiencies that outweigh any negative effects on competition.[45]

Efficiency can refer to allocative, productive or dynamic efficiency. *Allocative efficiency* is achieved when a market is in equilibrium, meaning that the production of a good is maintained at a level where the market price coincides with the marginal cost. In this situation, no market player can benefit without making someone else worse off. This is also known as *Pareto efficiency*.[46] Competitive pressure also creates *productive efficiency*, as companies will try to produce goods at the lowest cost possible. This will encourage companies to find new techniques to reduce production costs, which will reduce market prices as well.[47] *Dynamic*

[41] Wasastjerna 2019, p. 80.
[42] T-168/01, *GlaxoSmithKline*, ECLI:EU:T:2006:265, para. 118.
[43] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline*, ECLI:EU:C:2009:610, para. 62-63.
[44] Commission General Guidelines, para. 59.
[45] Commission Guidance Paper, para. 30. This exception has been established in case law, see e.g. C-209/10, *Post Danmark I*, ECLI:EU:C:2012:172, paragraphs 40 and 41 and C-27/76, *United Brands*, ECLI:EU:C:1978:22, para. 184.
[46] Jones - Sufrin - Dunne 2019, p. 8.
[47] Kuoppamäki 2003, p .36.

efficiency refers to the assumption that under competitive pressure, companies will try to innovate and develop better products. The discussion around innovation and dynamic efficiency has especially increased in the context of the digital economy.[48] Dynamic efficiency has not been scientifically proven and is thus usually studied separately from allocative and productive efficiency.[49]

"Effective competition" is another term often used in legal provisions and by regulators. A noteworthy case regarding efficiency is *Continental Can* in 1973, when the Court stated that the competition provisions (both Article 101 and 102) have as their goal to maintain effective competition.[50] Furthermore, mergers under the Merger Regulation are assessed based on whether they significantly impede effective competition.[51] Despite being a significant goal of EU competition law, effective competition is difficult to define in legal or economic terms. The term can be traced back to the 1940s, when John Maurice Clark developed the concept of *workable competition*. Opposing the idea of perfect competition, Clark proposed that multiple different criteria could be used to measure the degree of competition possible to achieve in a certain market.[52]

2.3.3 Consumer Welfare

The goal of protecting consumer welfare appears in multiple sources from official documents to legal literature and speeches given by EU officials.[53] For example, Article 101(3) of TFEU states that prohibitions in paragraph 1 are not applicable to agreements etc. which contribute to "improving the production or distribution of goods or to promoting technical or economic progress, while *allowing consumers a fair share of the resulting benefit.*" Recital 29 of the EU Merger Regulation states "[i]t is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular t*he potential harm to consumers*, that it might otherwise have and that, as a consequence, the concentration would

[48] Ezrachi 2018, p. 11.
[49] Allocative and productive efficiency are achieved under perfect competition, a theory that is examined in chapter 4.2.1. See Whish & Bailey 2018, pp. 6-7.
[50] C-6/72, *Continental Can*, ECLI:EU:C:1973:22, para. 25.
[51] Merger Regulation, Article 2(3).
[52] Lorenz 2013, p. 21-22.
[53] Consumer welfare has been repeatedly advocated in the speeches of Commissioners. Joaquín Almunia. a former Vice-President and Commissioner in charge of competition policy, has stated that "[a]ll of us here today know very well what our ultimate objective is: competition policy is a tool at the service of consumers. Consumer welfare is at the heart of our policy and its achievement drives our priorities and guides our decisions." See Almunia 2010.

not significantly impede effective competition …". As mentioned earlier, the Commission's General Guidelines state that enhancing consumer welfare is one goal pursued by competition rules.[54] From a theoretical perspective, the EU is a social market economy that aims to distribute wealth equally between all market actors, which means that consumers should receive a fair share of this wealth.[55]

Although the Treaties seem to promote a consumer welfare approach, and the term consumer welfare appears in various Commission documents and publications, the EU courts have not directly confirmed consumer welfare as a goal of competition law. This is not an insignificant remark, since the EU courts have an essential role in interpreting the Treaties.[56] However, in *Post Danmark I*, Grand Chamber of the ECJ did consider the effects of a dominant undertaking's conduct on consumers, referring inter alia to *consumer welfare, the consumers' interests*, and *harm to consumers*.[57] Another interesting remark was made by Advocate General Trstenjak in the *BIDS* case, as she made a distinction between Articles 101(1) and 101(3) stating that:

> "different aspects of *consumer welfare* are taken into account under Article 81(1) EC and under Article 81(3) EC. Under Article 81(1) EC, agreements which restrict competition between market participants -- directly affect consumer welfare and as such are prohibited in principle. Nevertheless, Article 81(3) EC recognises that -- the reduction in production costs can contribute indirectly to consumer welfare."[58]

Economics has begun to play an integral role in measuring consumer welfare. In its White Paper from 1999, the Commission stated that the purpose of Article 101(3) of TFEU is to "provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations."[59] According to Monti, this statement implied that the Commission wanted to separate non-economic values from competition law, which meant a notable shift in competition policy.[60]

[54] Commission General Guidelines 2004, para. 13.
[55] Hildebrand 2016, p. 2-3.
[56] Barnard - Peers 2014, p. 507.
[57] C-209/10, *Post Danmark I*, ECLI:EU:C:2012:172, e.g. paras. 20, 42 and 44.
[58] Opinion of Advocate General Trstenjak in C-209/07, *BIDS*, ECLI:EU:C:2008:467, paras. 56 and 57. Advocate General Wahl has also stated that competition rules aim to promote "the welfare of consumers". See Opinion of Advocate General Wahl in C-230/16, *Coty Germany*, ECLI:EU:C:2017:603, para. 32
[59] White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty, para. 57.
[60] Monti 2007, p. 90.

The Commission's General Guidelines, issued five years later, promote a similar economically oriented approach.[61]

Current legal literature suggests that the more economic approach, leading into a narrow, price-centred idea of consumer welfare, might need rethinking. Especially from the perspective of the digital economy, it has been argued that a rigid price-centric approach cannot respond to the developments of a modern society.[62] Ezrachi clarifies this by introducing three overlapping yet separate terms: consumer well-being (an abstract goal mentioned in TFEU), consumer welfare (the main goal of competition law), and the economic conception of consumer surplus, which is used to measure consumer welfare. Consumer surplus is the narrowest of these terms, indicating that the economic tools used to measure consumer welfare are not able to measure "the full spectrum of welfare effects".[63]

An interest towards a revised competition policy can be seen in the political field as well. The European Parliament advocates for a 'fundamental overhaul of competition policy' in its annual own-initiative report from January 2019. In its report, the Parliament:

> "Underlines the fact that competition rules are treaty based and, -- should be seen in the light of the *wider European values* underpinning Union legislation regarding social affairs, the social market economy, environmental standards, climate policy and consumer protection; takes the view that the application of EU competition law should address all market distortions, including those created by negative social and environmental externalities".[64]

The Parliament thus recognises the challenging relationship between competition law and these multidisciplinary interests. The report implicates that there is a political interest to include broader interests in competition policy.

[61] The objective of Article 101 (formerly Article 81), according to the guidelines, is to "protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources." See Commission General Guidelines 2004, para. 13.
[62] See Wasastjerna 2019, p. 152.
[63] Ezrachi 2018, p. 6. Gerbrandy makes a similar argument, suggesting that the current efficiency-focused approach might ignore significant societal issues. See Gerbrandy 2019, p. 131.
[64] Parliament Annual Report (2018/2102(INI)), paragraphs 8 and 10.

2.3.4 Protecting the Competitive Process or Protecting Competition

Protecting the competitive process can be viewed as a good itself. An environment that is ideal for creating and upholding competition is therefore maintained by protecting the competitive process itself, since the outcome of this process is not regarded as important. A distinction must be made between this and the previous approach. The approach introduced here believes that protecting the competitive process itself is the goal, whereas ordoliberalists view that the competitive process should be protected as a means to enhance individual economic freedom and participation in the market.[65] Protecting competition as such has been recognised in the decisions of ECJ as well.[66]

2.3.5 Economic Freedom and the Dispersal of Economic Power

Protecting the individual economic freedom has its roots in *ordoliberalism*. Ideally, economic freedom guarantees that economic actors can operate in the market without being restricted by private or public economic power. At its extreme, this goal is criticised to ultimately disperse large but efficient companies, even if their actions do not restrict competition.[67] This goal is similar to the *protection of competitors*, which is often linked to distrust regarding big firms. A relevant distinction should be made between whether competitors are protected in order to protect competition itself, or certain competitors are protected in order to maintain the current market structure or to protect those certain smaller competitors.[68] From an economic perspective, the latter is actually said to be put consumer welfare to a disadvantage. Especially Chicago scholars have avoided this "sentimental" approach due to its economic indications.[69]

2.3.6 Fairness and Equality

Despite its ambiguous nature, *fairness* and the notion of *fair competition* is rather common in discussion regarding EU competition law.[70] In this sense, fairness in competition law can be divided to horizontal fairness on the demand side (between consumers) and on the supply side

[65] Jones - Sufrin - Dunne 2019, p. 31.
[66] See e.g. C-68/12, *Slovenská sporiteľňa*, ECLI:EU:C:2013:71, para. 18 and Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline*, ECLI:EU:C:2009:610, para. 63.
[67] Cseres 2005, p. 248.
[68] Jones - Sufrin - Dunne 2019, p. 31.
[69] EU competition law, on the contrary, is known to have had such a "sentimental" approach in several cases. See Whish - Bailey 2018, p. 21.
[70] Wasastjerna 2019, p. 86-87.

(between producers), as well as vertical fairness (between producers and consumers) and procedural fairness. Alternatively, fairness can be understood as a natural outcome of competition law instead of its goal. The word 'competition' itself refers to equal opportunity, and thus implies that fairness is already an essential part of competition law.[71] Fairness can also be viewed as an element of consumer welfare. In Commissioner Vestager's speech in 2018, she stated that "[l]ike any other rules that govern our world, we have competition rules because we believe they make our society a better place to live. That they make our markets work more fairly for consumers."[72] According to another speech, "our only goal, as competition authorities, is to make sure that consumers get a fair deal."[73]

Equality in all the Union's activities is pursued by Article 8 TFEU. As wealth inequality has become an increasingly topical concern, some view competition laws as a potential weapon to fight against it. This approach would argue that market power creates inequality, and that competition enforcement could create *equality by redistribution*. This way, competition law would promote economic equity over economic efficiency.[74] From the perspective of the European school of thought, social fairness and social equality are core values of the *social market economy*, and thus the equality principle can be viewed as an integral objective, or an intrinsic value, of EU competition law. The equality principle can be perceived through fair wealth distribution or as equal competition conditions between market actors.[75]

2.3.7 Single Market

Competition law is an essential instrument of single market integration, an objective unique to the European Union.[76] Competition policy was in fact among the set of policy instruments that were intended to enhance the objective of economic integration in the Treaty of Rome.[77] Article 3(3) of TEU sets out the goal of establishing an internal market, which is defined in Article 26

[71] Jones - Sufrin - Dunne 2019, p. 31-33.
[72] Vestager 2018b.
[73] Vestager 2018a.
[74] Whish - Bailey 2018, p. 20.
[75] Equality through fair wealth distribution is pursued by Article 101(3) TFEU. Equality in competitive conditions can be perceived in abuse cases, for example. A dominant company is not assumed to engage in abusive behaviour, unless such conduct is proven. On the other hand, abusive behaviour is condemned, since the non-dominant company has no chance to compete by such behaviour. See Hildebrand 2016, pp. 3-4.
[76] See e.g. Joined Cases C-403/08 and C-429/08, *Football Association Premier League*, ECLI:EU:C:2011:631. For legal literature, see Bishop - Walker 2010, p. 5 and Whish - Bailey 2018, p. 23.
[77] Jones - Sufrin - Dunne 2019, p. 43-44. Jones et al. mention several cases, where the Commission and ECJ have stressed the nature of competition rules in achieving the single market. In 2015, Commissioner Vestager stated that "Competition policy is very much at the core of the process of European integration." See Vestager 2015a.

of TFEU as follows: "[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."

The single market has been set up by removing regulatory barriers to trade, and competition law can be used to ensure that there are no private restrictions which might form similar barriers. The European single market has recently opened up to new dimensions, as the Digital Single Market Strategy was adopted in 2015.[78] The Digital Single Market ensures the free movement of persons, services and capital, and that individuals and businesses can seamlessly access and engage in *online activities* under conditions of fair competition.[79] The Commission recently initiated public consultations regarding two new legislative instruments as a part of the Digital Services Act package, which shows that the regulatory environment is slowly starting to react to the fast developments of the digital economy.[80]

[78] Hildebrand 2016, pp. 59-60.
[79] European Commission, Shaping the Digital Single Market. https://ec.europa.eu/digital-single-market/en/policies/shaping-digital-single-market.
[80] European Commission, The Digital Services Act package. https://ec.europa.eu/digital-single-market/en/digital-services-act-package.

3 Public Policy Considerations and EU Competition Law

3.1 Defining Public Policy Considerations

In civil law systems, *public policy* or *ordre public* is considered to form the foundations of a legal and social system. The common law understanding of public policy is wider, as it may also entail political preferences regarding societal priorities. Public policy is terminologically often linked with public interest, although some commentators consider these concepts to be distinct from each other.[81] *Public interest* is a somewhat more abstract concept, which describes the opposite of private interest. Public interest can refer to the society, a group of individuals, or local interests.[82]

Knoepfel and Larrue define public policy as follows:

> "a series of intentionally coherent decisions or activities taken or carried out by different *public – and sometimes – private actors* -- with a view to resolving in a targeted manner a problem that is *politically defined as collective* in nature. This group of decisions and activities gives rise to formalised actions -- that are often aimed at modifying the behaviour of social groups presumed to be at the root of, or able to solve, the collective problem to be resolved -- ".[83]

In the context of the Treaties, public policy may constitute an exception to the free movement rights.[84] Looking at the TFEU's provisions having general application (Title II), all Union policies and activities should consider equality (Article 8), employment, social protection, education and human health (Article 9), environmental protection and sustainable development (Article 11), and consumer protection (Article 12). In specified Union policies, animal welfare should be considered as well (Article 13).

For the purposes of this thesis, public policy considerations should be understood in a rather broad manner, as possibly overlapping with the concept of public interest. Public policy considerations may in some instances restrict the application of competition rules, and in some

[81] Bělohlávek – Rozehnalová 2012, p. 118.
[82] Ibid., p. 121.
[83] Knoepfel – Larrue 2007, p. 24.
[84] For example, Article 36 TFEU may allow restrictions on imports or exports, if they are justified on grounds of public policy.

instances guide legislative or other government activities.[85] In the context of competition law, public policy considerations represent non-economic or non-competition interests, which often pursue values promoted in other areas of EU law. Since private actors may also engage in initiatives that promote the public interest (e.g. sustainability agreements), public policy considerations should also include certain activities of private actors. All in all, this definition conceives public policy considerations as values often colliding with economic interests and the efficiency goal of competition law, at least *prima facie*.

There are currently a few exemptions within the EU competition regime that allow for public policy considerations. Article 346(1) b of TFEU provides that competition rules are not applicable and thus competition is not considered to be hampered if a Member State engaging in arms trade takes protective measures to guard its national security. Article 106(2) of TFEU contains an exemption for undertakings of general economic interest whose performance is hindered by competition rules. Article 21(4) of the Merger Regulation allows Member States to protect "legitimate interests" arising in mergers to which the Regulation is applicable. These interests may include public security, plurality of the media or other public interests.

Legal literature mentions public policies and the public interest as a possible goal of competition law. According to Jones et al., certain governmental policies may be advanced by means of competition law. These policies might aim to protect for example employment, different industries, the environment, social aspects or regional interests.[86] Whish and Bailey mention unemployment and regional policies as interests that often arise in merger cases.[87] Another noteworthy issue is protecting national firms from foreign takeovers, and other such national interests or Union-wide interests.[88] National interests and the European interest against third countries has been visible in recent discussion regarding the so-called *European champions*.[89]

[85] In this sense, public policy considerations (in the context of this thesis) have both a negative and a positive dimension.
[86] Jones - Sufrin - Dunne 2019, p. 34.
[87] Whish - Bailey 2018, p. 23.
[88] Ibid., p. 23. Foreign subsidies are an example of a recent example of protecting the single market. The Commission has stated that foreign subsidisation, while giving opportunities to the Union, poses a risk of undermining competitiveness and the level playing field in the EU. See Commission White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253, p. 6.
[89] The proposed merger between Siemens and Alstom sparked the discussion of European champions. Although the merger was prohibited, some would have preferred to allow the creation of a European champion to compete with China. See M.8677, *Siemens/Alstom*, para. 495 and Bublitz - Leisinger - Yang 2019, p. 309.

In addition to the aforementioned, Monti's assessment of public policies includes consumer policy and culture.[90]

Using competition law as a means to promote certain socio-political goals is criticized for the fact that public policies might hamper the efficiency goal. Some jurisdictions, such as South Africa and China nevertheless have governmental policies incorporated into their competition laws. The weakness of public policy considerations lies perhaps in the vagueness of the term. Public interest goals of competition law raise concerns due to the fact that they might leave too much to the discretion of the courts and include value-based decisions, which are more difficult to measure with economic terms.[91]

3.2 Past Cases

3.2.1 Environmental Concerns

The crossover between competition and environmental protection can be traced back to the 1990s. In *Exxon/Shell*, the Commission assessed an anticompetitive agreement, which would reduce costs, improve product quality, reduce the use of raw materials and plastic waste, and thus the environmental risks related to the transport of polyethylene. These positive effects, according to the Commission, would be perceived as "beneficial by many consumers at a time when the limitation of natural resources and threats to the environment are of increasing public concern."[92] In *Philips/Osram*, the Commission concluded that the use of cleaner facilities would reduce air pollution, which in turn would benefit consumers directly and indirectly from reduced negative externalities.[93]

The *CECED* case[94] is an especially noteworthy example of how environmental aspects have been considered on grounds of Article 101(3). The members of CECED, having over 90% of the EU market together, had entered into an agreement that aimed inter alia to reduce the energy

[90] Monti 2007, p. 99-102. In response to a written question by the European Parliament, the Commission has stated that it is "prepared to take account of *cultural aspects* in its decision making under EC Treaty provisions, such as in application of the Community competition rules." The Commission even considered this obligatory under the current Article 167(4) TFEU. See Van Miert's answer to written question regarding book price agreements, E-0773/98, 1998.
[91] Jones - Sufrin - Dunne 2019, p. 34-35.
[92] IV/33.640, *Exxon/Shell*, para. 71.
[93] IV/34.252, *Philips/Osram*, para. 27.
[94] IV.F.1/36.718, *CECED*, 2000/475/EC.

consumption of domestic washing machines. Even though the agreement was considered to restrict competition within the meaning of Article 101(1), the Commission concluded that the agreement was exempt under Article 101(3) due to its environmental benefits.[95] In its assessment, the Commission considered both *individual* economic benefits and *collective* environmental benefits. The latter was especially interesting, since the Commission concluded in its assessment that "*environmental results for society* would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines."[96] Another environmental case worth mentioning is *DSD*, where the Commission considered the fact that certain agreements regarding a waste collection system gave effect to national and EU legislation regarding packaging waste and concluded that consumers would benefit from the improvement of environmental quality, namely the reduction of packaging waste.[97]

The Commission has later perhaps downplayed the relevance of the *CECED* decision. In the Commission's Horizontal Guidelines, a very similar case is presented as an example of standardisation agreements, but the grounds for applying Article 101(3) are mostly based on direct qualitative and cost efficiencies (such as an increased amount of washing programmes and lower energy costs). The environmental benefits for society are thus ignored, or at least formulated in more economic terms.[98] From a contextual point of view, it should be noted that the *CECED* decision was made before the modernisation and the decentralisation of enforcement. After this development in EU competition law, the prevailing view has been that decisions such as *CECED*, whereby agreements that restrict competition are justified for promoting other EU policy goals, would no longer be possible.[99]

3.2.2 Industrial and Social Policy

The Commission has balanced industrial policy goals against undistorted competition especially in the 1980s, when it exempted so-called *crisis cartels*. These restructuring agreements were found to restrict competition, as they aimed to create a situation where the remaining competitors could raise prices to a profitable level.[100] In an industry suffering from

[95] Talus 2011, p. 257.
[96] IV.F.1/36.718, *CECED*, 2000/475/EC, para. 56. The Commission took into account Article 174 of the EC Treaty, which promotes i.a. rational utilisation of natural resources.
[97] COMP D3/34493, *DSD*, paras. 143 and 148.
[98] Commission Horizontal Guidelines, para. 329.
[99] Buttigieg 2009, p. 134-135.
[100] Witt 2012, pp. 447-448.

economic recession, however, the Commission considered that such agreements would re-establish secure market conditions. The expected increases in prices were allowed, since the agreements were believed to guarantee a more stable supply of goods.[101] The effects of the recession were explicitly addressed by the Commission in its Tenth Report on Competition Policy, where it stated that in the current circumstances, "competition policy not only has to sustain effective competition; it has to support an industrial policy which promotes the necessary restructuring."[102] A recent example of the industrial policy debate is the prohibited Alstom/Siemens merger, which raised discussion of the European champions.[103]

Historically, social considerations have been relevant within industrial policy, as employment aspects have also been considered in the assessment of restructuring agreements.[104] Looking back to even earlier cases, the ECJ's decision in *Metro* was significant as regards employment. In this case, the ECJ assessed a selective distribution system for electric equipment. Despite the fact that public policy considerations did not justify the restriction of competition, the court considered that employment could be considered as an exception under Article 101(3).[105]

3.2.3 Professional Rules and Regulatory Ancillary – the Wouters Doctrine

In *Wouters*, the ECJ assessed the Netherlands Bar rules, which prohibited professional partnerships between lawyers and consultants. The reasoning behind the prohibition was to protect the independent exercise of the profession.[106] The ECJ considered that the legislation had an adverse effect on competition in the meaning of Article 101(1) of TFEU, but that the objectives of these restrictions could be taken into account in the assessment. The ECJ concluded that the national legislation did not infringe Article 101(1), since it was "necessary for the proper practice of the legal profession, as organised in the Member State concerned."[107] This case created the so-called *Wouters doctrine*, according to which a restrictive decision of

[101] See e.g. IV/31.846, *Enichem/ICI*, paras. 32 and 38, IV/31.055, *ENI/Montedison*, paras. 31-32, and IV/30.863, *BPCL/ICI*, para. 36.
[102] Commission's Tenth Report on Competition Policy 1981, p. 9.
[103] See M.8677, *Siemens/Alstom*, para. 495 and Bublitz - Leisinger - Yang 2019, p. 309.
[104] In *Ford/Volkswagen*, the Commission took into account that the joint venture would create 5,000 more jobs. See IV/33.814, *Ford/Volkswagen*, para. 36 and Witt 2012, p. 450.
[105] C-26-76, *Metro*, ECLI:EU:C:1977:167, paras. 1 and 43.
[106] C-309/99, *Wouters*, ECLI:EU:C:2002:98, para. 16.
[107] C-309/99, *Wouters*, ECLI:EU:C:2002:98, para. 110.

an association of undertakings could be exempted from the prohibition in Article 101(1) TFEU, if such a restriction was inherent in pursuing a legitimate objective.[108]

The *Wouters* case raised the question of what kind of objectives can justify a restriction within Article 101(1). Legal literature divides into two types of interpretation. Some view that certain self-regulatory measures, that would otherwise infringe Article 101(1), could be allowed if they served the public interest.[109] Monti argues that by the *Wouters* judgement, the ECJ attempted to establish a doctrine of including public policy considerations in the assessment of competition cases.[110] The other line of interpretation is based on the argument of *regulatory ancillarity*. According to Whish and Bailey, the restrictions in *Wouters* were ancillary to a regulatory function, which aimed to guarantee integrity and experience in the legal profession.[111] The second interpretation thus links the public interest aspect to some type of government involvement.[112]

A continuum of the *Wouters* case is *OTOC*, where a professional association, OTOC, adopted a regulation that required compulsory training for chartered accountants. Citing the *Wouters* case, the ECJ did consider the objective of the restrictive measure, which was to guarantee the quality of services in accounting. However, the ECJ concluded that the restrictions go beyond what is necessary to achieve this objective and thus violate Article 101(1) TFEU.[113] Similarly, in the *API* case, the ECJ considered that while road safety could constitute a legitimate objective within the meaning of the *Wouters* doctrine, the fixing of minimum operating costs cannot be justified by a such an objective.[114]

What is the relevance of the *Wouters* case law? It has been argued cases regarding professional rules – *Wouters*, *OTOC* and *CNG* – could be explained in economic terms and in close accordance with Article 101(3) TFEU. The professional services in these cases are difficult for the consumer to evaluate, which ultimately might lead to an *information asymmetry* between the consumers and the service providers. The professional rules placed on said professionals

[108] Janssen - Kloosterhuis 2016, p. 335.
[109] Janssen - Kloosterhuis 2016, p. 335. See also Komninos 2005, p. 13 and Nazzini 2006, p. 526.
[110] This type of balancing could be compared to free movement cases, where mandatory requirements of public policy may be included in the assessment. See Monti 2002, p. 1088.
[111] Whish - Bailey 2018, p. 139.
[112] Janssen - Kloosterhuis 2016, p. 335.
[113] C-1/12, *OTOC*, ECLI:EU:C:2013:127, paras. 93, 100, 108. A third relevant case regarding professional rules is CNG, in which the ECJ considered professional rules for geologists. See C-136/12, *CNG*, ECLI:EU:C:2013:489, para. 57.
[114] Joined Cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13, *API*, ECLI:EU:C:2014:2147, paras. 48, 51, 57.

could be viewed as a *response to a market failure*, namely information asymmetry. From an economic perspective, a response to a market failure can lead to efficiencies which benefit the consumer. To conclude, the *Wouters* case law regarding professional rules could be explained in economic terms.[115]

However, within the *Wouters* case law, the ECJ has also assessed certain public policy objectives which cannot be formulated in economic terms. These considerations include the sound administration of justice (*Wouters*) and the protection of road safety (*API*). One distinctive factor is that in the *Wouters* case law, the association of undertakings which adopted the restrictive measure, was founded in public law. Thus, in all these cases, the government is somehow involved in assigning the tasks of the association.[116] This explanation reflects the term *regulatory ancillarity* suggested by Whish and Bailey.[117] The relevance of the *Wouters* doctrine is perhaps centred around the cases described above.[118]

The brief assessment of the *Wouters* doctrine provides an insightful example of the balancing of different interests in competition cases. It must be noted that in neither *Wouters* nor in *API* did the ECJ clearly state that the public policy consideration in question would constitute a legitimate interest to be balanced against Article 101(1) TFEU.[119] Despite this, it could be argued that these cases have involved some type of public policy assessment. As the cases linked with regulatory ancillarity are about public policy interests ultimately guarded by the government (a public entity), a difficult question arises when one considers the possibility of private entities to protect public policy interests.

3.2.4 Privacy in the Digital Economy

The rapidly developing digital economy has given rise to a debate regarding the value of personal data in a competition assessment. A momentous case regarding privacy concerns is the German *Facebook* case. The Bundeskartellamt prohibited Facebook from using exploitative business terms, whereby Facebook combined data received from Facebook user accounts with

[115] See Janssen - Kloosterhuis 2016, p. 337 and Colomo 2012, pp. 550-551. For further remarks on asymmetries in the liberal professions and their regulation, see Commission Report on Competition in Professional Services, 2004.
[116] Janssen - Kloosterhuis 2016, pp. 337-338.
[117] Whish - Bailey 2018, p. 139.
[118] Janssen - Kloosterhuis 2016, p. 339.
[119] In *API*, the ECJ did state that "it cannot be ruled out" that road safety is a legitimate interest. See Janssen - Kloosterhuis 2016, p. 338 and *API*, para. 51.

data received from Facebook's other social media platforms (such as WhatsApp and Instagram), or from third party websites which include a "Like" or "Share" button. According to the Bundeskartellamt's decision, Facebook's data gathering practices constituted an abuse of dominant position, while also violating the European data protection rules.[120] The main proceedings are still open, as Facebook appealed the decision to the Düsseldorf Higher Regional Court.[121]

The *Facebook* case raises the question of whether data and privacy should be considered in competition assessment, as personal data is a valuable asset, yet it does not necessarily show in a firm's market share. It has been suggested that personal data could be assessed as a quality element of a product, or in a wider sense, as part of *consumer well-being*.[122] The digital economy discussion perhaps falls outside the scope of public policy considerations, at least to the extent that personal data is considered as a quality element of a product. However, it clearly demonstrates that competition law may need to accommodate multidisciplinary and non-economic values due to the developments in our (digital) society.[123] Furthermore, privacy and the protection of personal data is protected by *fundamental and human rights*, which gives this discussion significant weight.[124] Privacy and data protection are also ultimately linked to human dignity, an absolute human right.[125]

3.2.5 Rights of the Defence

On one hand, fundamental and human rights can be conceived as an interest colliding with economic interests in the competition assessment. On the other hand, fundamental and human rights might arise in the *procedural aspects* of competition cases, namely as the rights of the defence. One recent example of the human rights aspect in competition proceedings is the decision of the Finnish Deputy Chancellor of Justice (DCJ), according to which the Finnish

[120] Bunderskartellamt B6-22/16, *Facebook*, 2019. See also Bundeskartellamt's press release of 7 February 2019.
[121] The Bundeskartellamt's decision was first suspended by the Düsseldorf Higher Regional Court in interim proceedings (VI – Kart 1/19), but this decision was opposed by the Federal Court of Justice in a decision of 23 June 2020 (KVR 69/19), according to which Facebook must implement the Bundeskartellamt's decision. See Lexology 2020.
[122] Wasastjerna 2019, pp. 184-185.
[123] The Commission has already reacted to the developments in the digital economy by launching an initiative to create a new tool to address competition in platform-based and other markets. See Commission Impact Assessment, New Competition Tool, Ref Ares(2020)2877634, p. 1.
[124] The right to respect for private and family life is ensured in Article 7 of the Charter of Fundamental Rights of the European Union, whereas the right to the protection of personal data is enshrined in Article 8.
[125] Wasastjerna 2019, p. 47.

Competition Authority's conduct to prohibit recordings of hearings is unlawful. The competition authority's conduct was considered to violate the freedom of speech and rights of defence, both protected by the European Convention on Human Rights (ECHR). Furthermore, the DCJ emphasised the right to a fair trial, the principle of equality of arms and principles of good governance.[126]

In addition to having a human rights element, the rights of defence constitute a general principle of EU law.[127] A "textbook example" of the rights of defence, as described by Advocate General Kokott, can be found in *UPS*.[128] In *UPS*, the Commission appealed against the General Court's decision, whereby the Commission's decision to prohibit the merger between UPS and TNT was annulled. The ECJ dismissed the Commission's appeal on the grounds that the rights of defence had been violated, as the Commission had adopted its decision relying on an econometric model which had not been brought to the attention of the parties concerned. The ECJ also emphasised that the rights of the defence are closely linked to the *principle of good administration*, guaranteed in Article 41 of the Charter of Fundamental Rights of the European Union.[129] In certain cases where the Commission has issued fines but the parties involved consider that their rights of defence have been violated, the fines have been reduced by the EU courts.[130]

Addressing the rights of defence in competition law entails a balancing between effective enforcement of competition law and procedural fairness. The latter is closely linked to fundamental and human rights, as well as to the rule of law.[131] It has been argued that the Commission has a rather low burden of proof in competition enforcement, which depicts a similar balancing between effectiveness and the rights of the defence.[132]

[126] Deputy Chancellor of Justice: decision regarding lawyer's right to record the hearing and inspection situation. OKV/3/10/2020, p. 2 and 5. The DCJ referred to Article 6 (right to a fair trial) and Article 10 (freedom of expression) of the ECHR.
[127] See e.g. C-349/07, *Sopropé*, ECLI:EU:C:2008:746, para. 36 and C-265/17 P, *UPS*, ECLI:EU:C:2019:23, para. 28.
[128] Opinion of Advocate General Kokott in C-265/17 P, *UPS*, ECLI:EU:C:2018:628, para. 21.
[129] C-265/17 P, *UPS*, ECLI:EU:C:2019:23, paras. 4, 5 and 34. See also Opinion of Advocate General Warner in C-17/74, Transocean Marine Paint Association, ECLI:EU:C:1974:91, p. 1089.
[130] See e.g. C-607/18 P, *NKT*, ECLI:EU:C:2020:385.
[131] Sokol - Lianos 2012, pp. 22-24.
[132] Raitio 2018, p. 492.

3.3 Sustainability as a Recent Example

3.3.1 Sustainability in the European Union

Sustainability has become an extremely topical question in the European competition arena. As a non-economic, multidisciplinary value, which does not directly benefit the consumer, it could be depicted as a public policy consideration as well. Thus, this chapter will highlight sustainability as a topical dimension of public policy considerations and review the difficult questions related to it.

One definition of sustainability can be found in the so-called Brundtland Report, according to which "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[133] A topical document in this regard is the 2030 Agenda for Sustainable Development, which all United Nations Member States adopted in 2015. The goals in this agenda include three dimensions of sustainable development: *the economic, social and environmental*.[134] As sustainable development is sometimes linked narrowly to environmental issues only, it is necessary to highlight that it also includes an economic and social aspect. The EU has also aligned its policies with the 2030 Agenda.[135]

Although sustainability is a somewhat recent trend in political and academic discourse, it is by no means a new concept. It is embedded in the Union's objectives, as Article 3 TEU aims for "the sustainable development of Europe", and even "the sustainable development of the Earth". As the protection of the environment is a central element of sustainability, it should be emphasised that the EU also aims to improve the quality of the environment.[136] The difficult question is how these objectives could or should be considered in competition law.

[133] Brundtland Report 1987, p. 43. See also UN Resolution 66/288, which describes sustainable development as the development towards "an economically, socially and environmentally sustainable future for our planet and for present and future generations."
[134] The 2030 Agenda includes 17 Sustainable Development Goals and 169 targets. To give a few examples, the manifold goals include ending poverty and hunger, achieving gender equality, promoting sustainable economic growth and decent work, ensuring access for affordable, reliable, sustainable and modern energy, combating climate change, and ensuring sustainable consumption. See UN 2030 Agenda for Sustainable Development 2015, p. 1 and 14.
[135] The New European Consensus on Development 2017, para. 7.
[136] See Articles 3(3) and 3(5) TEU.

3.3.2 Recent Developments

As mentioned in chapter 2.3.3, the European Parliament has already called for consistency between competition rules and the different values of the Treaties.[137] A significant sustainability initiative in EU policy is the European Green Deal, which aims for the EU to be climate neutral by 2050.[138] Commissioner Vestager has emphasised the widespread impact of this objective, stating that "all of Europe's policies – *including competition policy* – will have their role to play in helping to get us there."[139] One concrete consequence of the Green Deal can be found in the Farm to Fork Strategy, an initiative which aims to ensure sustainable food systems. The Commission recognises in the strategy that competition rules need to be clarified in order to allow for collective initiatives which promote sustainability in supply chains.[140] Commissioner Vestager has also suggested that the Commission's ongoing review of the two Horizontal Block Exemption Regulations[141] could be an opportunity to provide guidelines on sustainability agreements that do not infringe competition rules.[142]

A significant development within the Member States has been the draft guidelines on sustainability agreements, issued by the Dutch competition authority (ACM). The sustainability guidelines follow the three-fold UN definition, according to which sustainable development is development towards "an economically, socially and environmentally sustainable future for our planet and for present and future generations.[143] Under this definition, the guidelines aim to clarify the situations in which certain sustainability agreements do not infringe Article 101 TFEU and the Dutch Competition Act.[144]

Within the "old" competition regime, environmental concerns were considered in multiple cases. *Exxon/Shell*, *Philips/Osram*, *CECED* and *DSD* (all reviewed above in chapter 3.2.1) are examples of the pre-modernisation case law, where sustainability concerns have been

[137] Within the context of sustainability, it is especially significant that the Parliament "underlines -- that the narrow interpretation of Article 101 of the TFEU by the Commission's horizontal guidelines has increasingly been considered an obstacle to the collaboration of smaller market players for the adoption of higher environmental and social standards", and "stresses that consumers have interests other than low prices alone, including animal welfare, environmental sustainability, rural development and initiatives to reduce antibiotic use and stave off antimicrobial resistance, etc." See Parliament Annual Report (2018/2102(INI)), paras. 48 and 78.
[138] Commission Communication on the European Green Deal 2019, p. 2.
[139] Vestager 2019.
[140] Commission Communication on the Farm to Fork Strategy 2020, p. 10.
[141] Commission Regulations (EU) No 1217/2010 (Research & Development Block Exemption Regulation - 'R&D BER') and 1218/2010 (Specialisation Block Exemption Regulation - 'Specialisation BER').
[142] See Vestager 2019.
[143] ACM draft guidelines on sustainability agreements, para. 6. See also UN Resolution 66/288 2012, para. 1.
[144] Ibid., para. 8.

accommodated.[145] Sustainability is therefore not a new phenomenon at all, although it has received significant public attention only in the recent years. Post-modernisation cases have not been that successful from the perspective of sustainability. However, the growing attention on sustainability in competition cases demonstrates that it is increasingly difficult for EU competition law to isolate itself.

The problems in reconciling sustainability measures with competition rules are explicitly presented in the Dutch *Energieakkoord* case. In 2013, the Netherlands Authority for Consumers and Markets (ACM) assessed a plan to close down five power plants from the 1980s. The plan was based on the SER Energieakkoord for Sustainable Growth, an accord aiming to make energy supply in the Netherlands more sustainable. The plan was expected to fall under the exemption in Article 101 (3) TFEU, as well as the corresponding national exemption, as closing down the plants would have resulted in more sustainable energy production. However, the ACM estimated that this would also lead to increased prices. According to its analysis, the environmental benefits were insufficient compared to the price increase that would harm Dutch electricity buyers. The ACM thus concluded that closing down the power plants did not fulfil the requirements of the exemption laid out in EU and national legislation.[146]

Another interesting Dutch case is the *Chicken of Tomorrow*, which involved a sustainability agreement between producers and retailers promoting animal welfare, the environment and public health. An especially interesting feature of the case is that the ACM conducted a conjoint analysis in order to assess whether consumers would be willing to pay for the increased animal welfare and other measures pursued by the agreement. Based on the study, the ACM concluded that consumers would be willing to pay a small amount for the animal welfare and environmental measures, but the amount did not cover the price increase caused by the sustainability agreement. The sustainability agreement was thus not justified by Article 101(3) and constituted an infringement of competition rules.[147] Two points can be made about the *Chicken of Tomorrow*. First, despite the outcome of the case, it is significant for the sustainability discussion that a competition authority has concluded by conjoint analysis that consumers, at least in a specific market, are actually willing to pay (a small amount) for sustainability measures. Secondly, behavioural economics suggest that consumers' purchasing

[145] See IV/33.640, *Exxon/Shell*; IV/34.252, *Philips/Osram*; IV.F.1/36.718, *CECED*, 2000/475/EC and COMP D3/34493 – *DSD*.
[146] ACM analysis in *Energieakkoord*, 2013, pp. 6-7.
[147] ACM analysis in *Chicken of Tomorrow*. ACM/DM/2014/206028, p. 6.

choices are not necessarily a plain and clear demonstration of how much they are willing to pay for more sustainable products.[148]

Two significant mergers in the agricultural markets, *Dow/DuPont* and *Bayer/Monsanto*, are also worth mentioning within the sustainability theme. Both mergers were cleared by the Commission subject to structural remedies. When evaluating the effects of the *Dow/DuPont* merger, the Commission emphasised the significance of safe (innovative) crop protection products, which would ensure environmental safety and human and animal health.[149] The *Bayer/Monsanto* merger showed that other interests, in this case food safety, environment and climate, are difficult to fit in the competitive assessment of a merger review.[150] During its investigation, the Commission received over 50 000 petitions by email, over 5 000 petitions by letters and postcards, and uncounted tweets expressing concerns regarding the merger.[151] In its press release, the Commission underlined that it can only assess the merger from a competition perspective. According to the press release, "[w]hile these concerns are of great importance, they cannot form the basis of a merger assessment."[152]

3.3.3 How Could Competition Law Promote Sustainability?

Although this thesis does not pursue practical solutions, a few words can be said about accommodating sustainability concerns in competition law. This practical example emphasises that public policy concerns may be accommodated within the Treaty framework. Secondly, it demonstrates that certain interests that are often categorised as "non-economic" or considered solely value-based, may possibly be translated into economic or more competition-oriented terms.

Primarily, it seems that sustainability concerns could be accommodated in competition law without amending the Treaties themselves, as sustainability is already addressed in their provisions.[153] Sustainable development is one of the objectives of the EU expressed in Articles 3(3) and 3(5) TEU. Sustainability should also be acknowledged in the EU's policies and activities under Article 11 TFEU. The Treaty articles thus provide a solid foundation for

[148] Behavioural biases are discussed in more detail in chapter 4.1.3. For an insightful review on behavioural biases in relation to products with an environmental impact, see Volpin 2020, p. 11.
[149] M.7932 – *Dow/DuPont*, para. 1980.
[150] M.8084 – *Bayer/Monsanto*, paras. 3015 and 3016.
[151] Vestager 2017.
[152] Commission Press Release IP/18/2282.
[153] See e.g. Holmes 2020b, pp. 358-359 and De Stefano 2020, p. 44.

sustainability initiatives. However, the relationship between sustainability and competition could be clarified with Commission guidelines that give further instructions on how the balance is struck between these two in competition enforcement. In addition, block exemption regulation could be implemented to cover otherwise anti-competitive behaviour that sufficiently promotes sustainability.[154]

The inclusion of sustainability concerns could be argued to be possible *within the economic framework* that is currently applied. The argument is based on the premise that the benefits or damage that certain measures create could be quantifiable to some extent, and thus explained in economic terms.[155] For example, the Dutch sustainability guidelines recognise that environmental factors can sometimes be quantified by measuring the reduction or increase in harmful emissions over a specific period of time.[156] It has also been argued that sustainability could be interpreted as a non-price factor of a product, such as a quality-enhancing factor.[157] Kingston suggests that a holistic approach, one that balances sustainability against economic objectives, would require that the principle of proportionality is used to balance between these colliding interests.[158]

Another interesting element of modern sustainability initiatives is that they are often pursued by *private actors*, as is the case in sustainability agreements between undertakings. Sustainable development and other public policy goals have traditionally been considered as objectives pursued by governments, international organisations or other entities of a public nature.[159] The notion of private actors pursuing public policy objectives creates complexities on how public policy considerations are perceived and regulated. With the rise of corporate social responsibility, this new phenomenon provides a new perspective on public policy initiatives and requires flexibility from the legislator in order to succeed.[160]

[154] Holmes argues that amending the Treaties does not seem necessary but could be used as a last resort. See Holmes 2020b, p. 359.
[155] Kingston 2012, p. 163.
[156] ACM draft guidelines on sustainability agreements, para. 32.
[157] Volpin 2020, p. 10. Volpin argues that by measuring sustainability in more economic terms, it does not have to be always conceived as a public policy exception. Some authors recognize, however, that not all aspects of sustainability can be measured in such economic or competition-terms. See Gerbrandy 2020, p. 66.
[158] Kingston 2012, p. 124.
[159] Gerbrandy 2019, p. 136.
[160] For discussion on corporate social responsibility and regulation, see Berger-Walliser - Scott 2018.

3.4 Public Policy Considerations and the Freedom of Movement Rights

An interesting perspective to this topic is how public policy issues have been considered in cases regarding the internal market and the freedom of movement rights protecting it.[161] *Cassis de Dijon* introduced mandatory requirements which can under certain conditions restrict the free movement of goods. These restrictions may be allowed if they are necessary to "satisfy mandatory requirements relating *in particular* to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer."[162] The four conditions for national measures restricting the four freedoms, formulated in *Gebhard*, require that the measures are applied in a non-discriminatory manner, they are justified by "imperative requirements of general interest", they are suitable for achieving the goal pursued, and must not go beyond what is necessary to achieve it.[163] Although the legal basis for public policy exceptions cannot be covered thoroughly here, there are multiple examples in case law which demonstrate the balancing between the free movement rights and public policy interests.

A significant statement regarding social policy aspects was made by the ECJ in *Viking Line*:

> "Since the Community has thus *not only an economic but also a social purpose*, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include -- improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour."[164]

To use environmental concerns as an example, the ECJ has emphasised that environmental concerns may be justified as restrictions of the free movement rights. The ECJ confirmed that environmental concerns may be interpreted as a mandatory requirement for the first time in *Danish Bottles*.[165] In *Inn Valley*, the Republic of Austria had prohibited lorries of over 7.5

[161] The so-called four freedoms of the internal market are established in Article 26 TFEU.
[162] Although the free movement of goods prevailed in this case, the judgement is significant as it introduced the exception of mandatory requirements. The wording "in particular" suggests that this list is not exhaustive. See C-120/78, *Cassis de Dijon*, ECLI:EU:C:1979:42, para. 8.
[163] C-55/94, *Gebhard*, ECLI:EU:C:1995:411, para. 39. See also C-76/90, *Manfred Säger*, ECLI:EU:C:1991:33, para. 15, which refers to the public interest.
[164] C-438/05, *Viking Line*, ECLI:EU:C:2007:772, para. 79. For similar notions of the social objectives of the EU, see C-341/05, *Laval*, ECLI:EU:C:2007:809, paras. 104 and 105.
[165] See C-302/86, *Danish Bottles*, ECLI:EU:C:1988:421, para. 9 and Poncelet 2013, p. 186.

tonnes carrying specific goods from using a certain section of a motorway in Inn Valley. The measure was argued to ensure better air quality. According to the ECJ:

> "It is settled case-law that overriding requirements of protection of the environment can justify national measures that are liable to obstruct intra-Community trade, provided that those measures are suitable for securing the attainment of that objective and do not go beyond what is necessary for attaining it."

Although the measure was considered to go beyond what was necessary to attain the environmental objectives in question, the assessment of the ECJ clearly shows that environmental and other public policy concerns may be considered as lawful restrictions of the free movement rights.[166] There are also state aid -related cases, where environmental considerations and restrictions to free movement have been considered. In *PreussenElektra*, the ECJ evaluated national legislation promoting renewable energy, stating that the use of renewable energy is "useful for protecting the environment in so far as it contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat."[167] The ECJ also considered environmental aspects in *Mickelsson and Roos*, where the court concluded that national legislation prohibiting the use of jet skis on other than designated waters could be justified under certain conditions, as the legislation aimed for the protection of the environment.[168]

In a more recent and interesting judgement, the ECJ assessed a restriction on the freedom of establishment in Article 49 TFEU. The national measure in case was argued to protect the freedom and pluralism of the media, protected in Article 11(2) of the Charter of Fundamental Rights of the European Union. According to the judgement, "the safeguarding -- the freedom and pluralism of the media, unquestionably constitutes a legitimate aim in the general interest,

[166] C-28/09, *Inn Valley*, ECLI:EU:C:2011:854, paras. 124-125 and 150-151. For cases regarding waste management, see e.g. C-203/96, *Dusseldorp*, ECLI:EU:C:1998:316 and C-2/90, *Walloon Waste*, ECLI:EU:C:1992:310.
[167] C-379/98, *PreussenElektra*, ECLI:EU:C:2001:160, para. 73.
[168] C-142/05, *Mickelsson and Roos*, ECLI:EU:C:2009:336, paras. 40 and 44. The same national legislation was evaluated later in C-433/05, *Sandström*, ECLI:EU:C:2010:184.

the importance of which in a democratic and pluralistic society must be stressed in particular, capable of justifying a restriction on freedom of establishment."[169]

The ECJ has also acknowledged the Union's objectives set in the Treaties when assessing restrictions to the free movement rights. In *Inn Valley*, for example, the ECJ emphasised "a high level of protection and improvement of the quality of the environment", as well as "a high level of health protection".[170] In *Laval*, the court emphasised the "harmonious, balanced and sustainable development of economic activities" and "a high level of employment and of social protection."[171] Similarly, the policy-linking clause currently in Article 11 TFEU, requiring that environmental policy be integrated into other EU policies, has been noted by the ECJ in its decisions.[172] This depicts a somewhat holistic interpretation of EU law.

These examples show that the ECJ interprets the Treaty provisions in a rather holistic manner in cases regarding the free movement rights. The possibility of public policy restrictions to the freedom of movement rights is especially relevant, considering that it also entails the balancing between economic and public policy interests. As will be argued in chapter 4.2.5, the free movement rights and competition rules constitute the core parts of the same *economic constitution*, which implies that they should perhaps be interpreted in a coherent manner.

3.5 Contextual Remarks

All the cases introduced above, especially ones prior to the modernisation, must be interpreted in accordance with the legal atmosphere of that time. As was described in chapter 2.2, the modernisation of EU competition law was a significant turning point for public policy considerations. Prior to modernisation, the Commission and EU courts have been more open towards public policy considerations, especially as regards environmental considerations.[173] For example, the Commission stated in 1995 that "improving the environment is regarded as a factor which contributes to improving production or distribution or to promoting economic or

[169] Although the national measure was not considered to be appropriate for achieving the objective pursued, Vivendi provides a recent example of the court's interpretation of the four freedoms in relation to other values and rights established by EU law. See C-719/18, *Vivendi*, ECLI:EU:C:2020:627, paras. 57 and 79.
[170] C-28/09, *Inn Valley*, ECLI:EU:C:2011:854, para. 120.
[171] C-341/05, *Laval*, ECLI:EU:C:2007:809, para. 104.
[172] See e.g. C-379/98, *PreussenElektra*, ECLI:EU:C:2001:160, para. 76.
[173] See e.g. Townley 2009, p. 2, Monti 2007, p. 90, and Kingston 2012, p. 38.

technical progress."[174] In a decision from 1996, the General Court stated that the Commission may consider public interest requirements when assessing an exemption under Article 101(3) TFEU.[175] After the modernisation of EU competition law, the Commission has demonstrated a more restrictive approach towards public policy considerations. The Commission's General Guidelines, for example, seem to focus mainly on cost and qualitative efficiencies.[176]

However, the shifts in competition policy have been mainly advocated by the Commission, which seems to endorse various objectives more readily than the ECJ. The ECJ has practiced more caution in its judgements, which usually emphasise the broader framework of the EU Treaties.[177] Even after the key developments of the modernisation process, the ECJ has stated that the objective of competition rules is "preventing competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union."[178] Thus, it is relevant to ask whether the shift in competition policy should be accredited mostly to the Commission.

It could be argued that the pre-modernisation cases have not been rendered irrelevant by the more economic approach. Although the legal framework and competition policy has shifted towards an efficiency-oriented approach, EU competition law is nevertheless grounded in the broader framework of the EU Treaties, which promote other than economic values as well. Therefore, a relevant question for public policy considerations is whether competition law should promote them in light of the wider Treaty objectives, and how these colliding interests should be balanced. Another relevant concern, often expressed by critical commentators, is that of legal certainty.

3.6 The Principle of Legal Certainty

One of the most significant criticisms towards public policy considerations is concerned with legal certainty. The concept of public interest is viewed by many as vague and including public policy considerations in EU competition law is feared to increase uncertainty.[179] This concern

[174] European Commission, XXVth Report on Competition Policy 1995, para. 85. In contrast, the Commission General Guidelines from 2004 make no reference to environmental issues.
[175] Joined cases T-528/93, T-542/93, T-543/93 and T-546/93, *Metropole television*, ECLI:EU:T:1996:99, para. 118.
[176] Ezrachi 2017a, p. 131.
[177] Witt 2012, p. 444.
[178] C-52/09, *TeliaSonera*, ECLI:EU:C:2011:83, para. 22.
[179] Jones - Sufrin - Dunne 2019, p. 34.

is addressed below, with a focus on the theoretical background of the principle of legal certainty and its implications as regards public policy interests.

The principle of legal certainty is one of the *general principles* of EU law.[180] The principle calls for predictability and certainty in judicial decision-making, and one clear aspect of legal certainty is the principle of non-retroactivity.[181] On a general level, legal certainty is said to require precise norm-formulation, judicial review and democratic control.[182] Assessing legal certainty in the context of the European Union, one should note that the EU courts follow *teleological interpretation*, taking into account the objectives and legal principles of the Union.[183]

Popelier introduces a *dynamic conception of legal certainty*, which is construed by stability, simplicity and adaptability. This approach describes the balancing between *fixedness and flexibility*, and in legal terms is captured by the requirements of legal expectations and accessibility. Adaptability especially promotes the dynamic nature of this approach. If new developments of the society create challenges or unforeseen situations, the lawmaker should amend laws in order to capture these changes in legal terms.[184] When balancing between fixedness and flexibility, one should balance legitimate expectations against the general good, and consider inter alia how individuals are able to adapt to new rules, how the rules benefit the society, and whether the legal amendment was predictable.[185]

Raitio's analysis provides a more nuanced definition of legal certainty:

> "the principle of legal certainty in EC law relates to the principle of non-retroactivity and the protection of legitimate expectations in particular, but more profoundly it can be related to *the conceptual scale* for weighing up and balancing between predictability and acceptability, between formal justice and material fairness, in legal decision-making."[186]

[180] For case law, see e.g. C-13/61, *Bosch*, ECLI:EU:C:1962:11, p. 52 and C-80/86, *Kolpinghuis Nijmegen*, ECLI:EU:C:1987:431, para. 13.
[181] Storey - Pimor 2018, p. 55. The principle of non-retroactivity, on the other hand, is often linked to legitimate expectations. See Raitio 2003, p. 129.
[182] Raitio 2003, p. 127.
[183] Raitio 2018, p. 486.
[184] Popelier 2017, p. 37
[185] Ibid., p. 54.
[186] Raitio 2003, p. 387.

The conceptual scale is linked to a three-fold definition of legal certainty, which entails a metaphorical scale: formal legal certainty, factual legal certainty and substantive legal certainty. A predictable decision would emphasise formal legal certainty, whereas acceptability is a manifestation of substantive legal certainty.[187] In legal argumentation, one should start with linguistic interpretation and thus formal legal certainty. If a decision cannot be justified with solely linguistic arguments, the next levels of justification should consider conceptual definitions and *proto-norms*, which include legal principles and policies. The other end of this scale includes values and political morality, and thus represents a natural law approach.[188]

Looking at legal literature, public policy considerations are often viewed as problematic from the perspective of legal certainty. A practical argument is that businesses need to understand and predict the legal environment where they operate. This argument could be supplemented by stating that decreased legal certainty increases legal risks, and the existence of legal risks reduces a company's incentive to innovate and invest.[189] This notion is true, yet it is also quite paradoxical, as the recent discussion regarding sustainability agreements involves uncertainty as to whether companies may invest in a more sustainable business without breaching the competition rules – in other words, there is uncertainty regarding whether companies may invest in public policy -related goals. Today's companies might promote sustainability and other goals which have earlier been pursued mainly by governments, through public policy initiatives. In this sense, the tables have turned, and in some areas, businesses are calling for more guidance on whether they can promote goals traditionally viewed as public policy initiatives.[190]

One argument promoting public policy concerns would be that law is bound to always include some uncertainties.[191] Furthermore, the *Skanska* case demonstrates that the current competition rules sometimes create (arguably) unpredictable outcomes, even though the interests in the case are purely economic.[192] It must be noted, *prima facie*, that this argument is not that robust, although it provides another perspective to the discussion. Legal certainty is surely something that should be pursued, notwithstanding that it may never be achieved perfectly.

[187] Ibid., p. 373.
[188] Ibid., pp. 368-369.
[189] Townley 2009, p. 33.
[190] See chapter 3.3.3 for further discussion regarding sustainability initiatives.
[191] Townley 2009, p. 33.
[192] See C-724/17, *Skanska*, ECLI:EU:C:2019:204, para. 56 and the discussion in chapter 5.1.2.

Continuing on a practical note, the ECJ has stated that the principle of legal certainty requires that "legal rules be clear and precise, and aims to ensure that situations and legal relationships governed by Community law remain foreseeable."[193] How could legal certainty be ensured when it comes to public policy considerations? It is naturally desirable to formulate possible rules or exemptions regarding public policy initiatives as clearly as possible. If one could rely on clear legal rules and linguistic interpretation, the decision would enjoy formal legal certainty, which is surely a favourable starting point. As real-life situations are not always clearly and predictably captured by legal measures, the rules or exceptions should also include further guidance on which factors are weighed in interpreting these rules. Following Popelier's notions, the rules should, however, remain general enough to capture possibly unforeseeable developments.[194]

A fundamental issue in this regard is the fact that the ECJ has not given a clear definition of the objectives of EU competition law. Terms such as consumer welfare and consumer well-being, for example, remain without a clear definition. To cite Bork,

> "Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law – what are its goals? Everything else follows from the answer we give. Is the antitrust judge to be guided by one value or by several? If by several, how is he to decide cases where a conflict in values arises? Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules."[195]

It is true that the current effects -based competition law which utilises economic analysis might provide clearer and more predictable benchmarks, thus contributing to formal legal certainty. One approach to public policy considerations would be to emphasise the *dynamic nature of the law*. Ezrachi considers that a dynamic competition regime allows it to reflect on its surrounding environment and react to societal changes, without losing touch to its "conceptual core".[196] One recent example of the dynamic nature of EU competition law is the Commission's response to the Covid-19 crisis. During 2020, the competition framework has been swiftly amended to accommodate urgent needs related to the crisis, inter alia by issuing comfort letters and a temporary framework allowing a specific type of business cooperation.[197]

[193] C-63/93, *Fintan Duff v Minister for Agriculture and Food*, ECLI:EU:C:1996:51, para. 20.
[194] Popelier 2017, p. 54.
[195] Bork 1993, p. 50.
[196] Ezrachi argues that dynamism enables competition law to react to a crisis, for example, by loosening the legal requirements when necessary. See Ezrachi 2017, p. 67.
[197] See Commission Covid-19 Guidelines 2020.

Public policy considerations could be assessed with the two theoretical scales of legal certainty presented above, namely Popelier's scale from fixedness to flexibility and Raitio's conceptual scale from predictability to acceptability. On Popelier's scale, public policy considerations would certainly require some amount of flexibility from the competition framework. Emphasising adaptability, i.e. the requirement of reacting to new developments in the society, could justify an amendment in the competition framework, which would address rising societal issues, such as climate change. As for the scale proposed by Raitio, public policy considerations would emphasise acceptability and substantive legal certainty. However, it could be argued that public policy considerations could be supported in legal decision-making with conceptual definitions and proto-norms as well. This would certainly require a shift in competition policy and a recalibration of how different interests are balanced in competition assessment. Finally, public policy considerations could be supported with a clear legal framework, which would allow for some linguistic interpretation and thus promote formal legal certainty.

Admittedly, if the goals of competition law become fragmented, it is unlikely that formal legal certainty could be satisfied to the same extent as before. However, I do not believe that this would undermine the principle legal certainty entirely. Following the theories of Raitio and Popelier, legal certainty should be conceived *as a scale, and not as a finish line* that can only be crossed by fulfilling certain (formalistic) requirements. By emphasising the dynamic nature of the law, public policy considerations could perhaps be addressed while still respecting legal certainty. While the balance on the conceptual scale might slightly shift, I would argue that with a clear legal framework, it would not tip the balance to the detriment of formal legal certainty.

4 Theoretical Framework to the European School of Thought

4.1 Economic Theories as Basis for Competition Policy

4.1.1 Introduction

Competition law and enforcement is influenced by different underlying economic theories and assumptions, depending on the current time and place. Differing views on competition theory and competition economics can be categorised into economic schools of thought, although it must be emphasised that the schools of thought do not represent identical and uniform views.[198] Changes in economic theories usually affect competition enforcement, though as Monti explains it, these changes might very well take a decade to realize.[199] The use of different economic approaches in U.S. antitrust enforcement can be simplified as follows: in the 1960s and 1970s, the Harvard school's SCP model was followed, whereas the Chicago school gained popularity in the 1980s. The ideas of the Chicago school's successor, the post-Chicago school, have been applied (somewhat hesitantly) ever since the 1990s.[200] The European school was a late bloomer in this regard: it was not until the late 1990s that EU competition law started to rely on an economic approach that would be known as the European school of thought.[201]

Both the Harvard and Chicago schools of thought have had an impact on today's EU competition law. Although both schools originated in the U.S., it could be argued that the Harvard approach has retained its impact more within the EU than the U.S. As for the Chicago school of thought, it has gained more popularity in the EU through the "more economic approach" and a tendency towards effects-based assessment.[202]

The following assessment of the various schools of thought and their theoretical backgrounds aims to emphasise the unique theoretical framework of EU competition law. Although the Harvard school is briefly introduced as well, this assessment gives more emphasis on the

[198] Chang distinguishes nine different economic schools of thought: classical, neoclassical, Marxian, Schumpeterian, Keynesian, Austrian, institutional and behavioural economics, as well as developmentalism. See Chang 2015, p. 116.
[199] To use the U.S. as an example, post-Chicago ideas were on the rise already in the 1980s, yet this approach was not considered in antitrust enforcement until the 1990s. See Monti 2007, pp. 73-74.
[200] Ibid., p. 73.
[201] Commissioner van Miert initiated the modernisation of EU competition law, which would ultimately lead to "the more economic approach". The first document promoting the modernisation process was the Green Paper on Vertical Restraints, adopted by the Commission on 22 January 1997. See Hildebrand 2016, p. 16.
[202] Kingston 2012, pp. 21-22.

Chicago school's views and their fundamental differences with the European framework. This is mainly because the Chicagoan efficiency-focused approach is visible in U.S. antitrust and to some extent in EU as well. However, this chapter will emphasise certain views of the Chicago school that are at odds with the theoretical foundation of the European school. Ultimately, the following assessment aims to argue that the European school of thought forms a distinct approach to competition law, at the core of which is the *social market economy*. This also leads us to consider whether competition policy should be reconsidered in light of the social aspect of the social market economy.

4.1.2 Classical and Neoclassical Theories

Competition law was initially assessed from an economic perspective by classical and neoclassical economists. *Classical theory*, developed in the eighteenth century, was the first significant theory concerning competition economics. It was based on the freedom of competition and freedom of consumers to choose between alternative products. Adam Smith, a prominent name in classical theory, developed the concept of the *'invisible hand'*, which depicts the forces of competition that self-sufficiently create efficiency, without the need for government intervention.[203]

Theorists such as Cournot and Marshall later introduced the use of mathematical formulas in competition economics, a branch of theories usually called *neoclassical* theories. Neoclassical theorists developed the widely used and applied theory of *perfect competition*, which describes a market where no market participant has market power, thus creating an environment of perfect competition.[204] Perfect competition has five conditions: a large number of buyers and sellers, homogeneous products, perfect information, free entry and exit to the market, and zero transportation costs. The theory states that under conditions of perfect competition, the law of supply and demand would work through the equilibrium price, creating both allocative and productive efficiency.[205]

Although classical and neoclassical theories were able to study the effects of competition in a clear way, the theory of perfect competition is nowadays largely held somewhat unrealistic.

[203] Hildebrand 2016, p. 94.
[204] Ibid., pp. 96-97.
[205] The law of supply and demand was developed by Alfred Marshall, a prominent figure in neoclassical economics. See Geradin - Layne-Farrar - Petit 2012, pp. 63-65.

This is largely due to the fact that the five conditions of perfect competition hardly ever come true.[206] The theory is based on a conception of *homo economicus*, a rational individual who makes economic decisions in a somewhat predictable manner. This, as will be demonstrated in the next section, is not always true. Furthermore, the theory of perfect competition does not capture the dynamic nature of competition.[207] However, the theory of perfect competition is of great practical importance in competition law, as it is often used by competition authorities to study real-world behaviour.[208]

4.1.3 Behavioural Economics

There are multiple economic schools relevant to competition law, but behavioural economics is especially relevant as a comparison to the neoclassical *homo economicus* model. The neoclassical approach is based on the rational choice model, which presumes that an individual will make choices solely based on individual utility. Thus, the individual will choose an alternative that will maximise their self-interest.[209] This model has been challenge by a line of research, often categorised as behavioural economics. The research in behavioural economics has shown that individuals are not always rational: in fact, behavioural economics heavily criticises the neo-classical assumption of rational behaviour and self-interest. By including psychology in their evaluation, behavioural economists aim to provide a more realistic model of human behaviour.[210] Kahneman's theory of human thinking has shown that an individual's decision-making is not always rational and is sometimes affected by notable *systematic biases*.[211]

Behavioural economics has been discussed in the competition context as well.[212] The reason why consumer biases might be relevant for competition analysis is the fact that they question the validity of certain economic models used currently. While biases impact individual behaviour, this behaviour could be relevant through market demand and thus be of interest in

[206] Whish – Bailey 2018, p. 8. As a response to the shortcomings of perfect competition, John Maurice Clark developed the theory of *workable competition*, which aimed to identify the factors closest to perfect competition, under the actual market conditions. Later, he developed his ideas further into the idea of *effective competition*, which focused on the dynamic nature of competition. See Hildebrand 2016, pp. 102-106.
[207] Kuoppamäki 2003, p. 136.
[208] Hildebrand 2016, p. 98.
[209] Mathis - Steffen 2015, p. 31.
[210] Ibid., p. 36.
[211] Kahneman 2011, pp. 24-25.
[212] Wasastjerna's take on competition law and behavioural economics provides an insightful review of the relationship between these two disciplines. See Wasastjerna 2019, pp. 179-181.

competition cases.[213] The juxtaposition between the neoclassical and behavioural economics is closely linked to the public policy discussion, since these schools represent differing views. While the neoclassical approach believes in rational people and their freedom to act as they will, behavioural economists believe that humans cannot be absolutely rational. Thus, they suggest that public policy might provide help in making accurate and better decisions.[214] In a broader picture, behavioural economics has sparked discussion around *behavioural policy-making*, which links it not only to the economics aspect of this thesis, but to public policy as well.[215]

Behavioural economics and behavioural public policy are broad topics worthy of further research. In this context, however, I mainly aim to emphasise that the different premises underlying different economic theories have a significant impact on how competition is perceived and what tools are considered best for analysing it. Continuing on economic considerations, another essential element of competition economics is how consumer welfare is perceived and measured.

4.1.4 Welfare Economics

Despite the common use of the term *consumer welfare* in competition law, there are several conceptions of welfare in competition economics. A noteworthy distinction can be made between consumer welfare and total welfare. *Total welfare* (sometimes referred to as social welfare) consists of consumer surplus and producer surplus. *Consumer surplus* means the difference between what a consumer is prepared to pay for a product and what they actually pay for it. In other words, when the consumer buys the product for a lower price than what they were prepared to pay for it, consumer surplus is increased. *Producer surplus*, on the other hand, is increased when a producer is able to sell a product for a higher price than what the production cost was. *Consumer welfare*, as opposed to total welfare, is solely focused on consumer surplus.[216]

From an economic perspective, welfare is believed to increase with efficient allocation of resources. Economic efficiency is generally understood as *Pareto efficiency* or *Kaldor-Hicks*

[213] Oxera 2013, p. 30.
[214] This discussion is somewhat controversial, and it must be emphasised that the freedom of individuals is not in any way intended to be disregarded in this approach. See Kahneman 2011, p. 411.
[215] *Nudge*, a book written by Richard Thaler and Cass Sunstein provides significant insights to the discussion around behavioural public policy. See Thaler - Sunstein 2008.
[216] Jones - Sufrin - Dunne 2019, pp. 11-12.

efficiency. Pareto efficiency is based on the theory of the free market, which assumes that individuals have a freedom of choice to take part in transactions or not. Pareto efficiency is reached when an individual's position cannot be improved without worsening that of another individual (*Pareto-optimal* state). Based on the free market theory, Pareto efficiency is believed to increase with each market transaction.[217] Pareto efficiency as their basis, Nicholas Kaldor and John R. Hicks created a model which is applicable to the law. According to Kaldor-Hicks efficiency, a change will cause an improvement "whenever the winners consider their gains to be greater than the losers consider their losses to be." This model includes scenarios where nobody's position is worsened, as well as scenarios where one individual's position is improved, and another's is worsened.[218]

4.2 The European School of Thought

4.2.1 Theoretical Background

Before the modernisation of EU competition law, EU competition policy was mainly affected by ordoliberalism and the Harvard school of thought.[219] After the modernisation took place, economic analysis has become an essential part of interpreting and applying competition law within the European Union. Although economic literature does not usually recognise a European school, Hildebrand distinguishes the European school of thought as its own, distinct approach to competition economics.[220] The European school advocates that the market can only thrive, if it is backed by a *constitutional framework*, which allows for policy considerations such as social equality.[221] These values are pursued by protecting the competition process and ensuring that the benefits of competition are distributed *fairly and equally*.[222]

This chapter will follow Hildebrand's premise, according to which the European school of thought can be distinguished as an independent school of thought. The purpose of this chapter is not to deny the influence of other schools of thought, but rather emphasise the *sui generis*

[217] Mathis - Steffen 2015, p. 35.
[218] Ibid., p. 36.
[219] Kuoppamäki argues that ordoliberalism formed the theoretical foundation for EU competition policy, whereas the Harvard school's impact took over in the 1960s. See Kuoppamäki 2003, p. 213.
[220] Hildebrand 2016, p. 10.
[221] Ibid., p. 38.
[222] Ibid., p. 2.

features of the European school of thought, such as the social market economy, and examine the fundamental differences it has with the Chicago school.

4.2.2 Ordoliberalism

Ordoliberalism has had a fundamental impact on the early development of European competition law and policy.[223] Ordoliberalism is rooted in the 1930s, when the University of Freiburg scholars developed an idea that state intervention is necessary to protect competition in the market.[224] According to the Freiburg ideas, the market should be tied to a *constitutional framework*, which would guarantee that the profits from a competitive market were distributed equally. Even though state intervention was considered necessary, the constitutional framework was believed to minimize the need for it.[225] As Gerber puts it, ordoliberals were seeking a new liberal way between the American West and the Soviet East. They based their ideas on two principles of classical liberalism: competition promotes economic well-being, and economic freedom is a central value in addition to political freedom. The new wider concept of liberalism was based on the idea that individuals had to be protected from not only public, but also private power. In practice, this meant the dispersion of both political and economic power, especially monopolies.[226]

If we take a look at classical and neoclassical theories, some common ground can be found. Ordoliberalism agrees on the neoclassical view that individual freedom is best protected by the market mechanism. The differences relate largely to the functioning of the market mechanism. Whereas classical and neoclassical theories believe in the power of unregulated markets, ordoliberalists view that government intervention can prevent the negative effects of the market mechanism and thus consider societal concerns as well.[227]

According to ordoliberalism, an independent legal system is essential in order to protect individual freedom from public and private power. The lack of such a legal framework is believed to have contributed to the accumulation of economic and political power in Nazi Germany, ultimately assisting the forming of a dictatorship.[228] An essential part of

[223] See e.g. Giocoli 2009, p. 771; Gerber 2001, p. 264; and Felice - Vatiero 2015, p. 148.
[224] Geradin - Layne-Farrar - Petit 2012, p. 15.
[225] Gerber 2001, p. 232.
[226] Ibid., pp. 239-240.
[227] Gerbrandy 2019, p. 129.
[228] This also demonstrates the strong connection that ordoliberalist thinking has with the traumatic experiences of World War II. See Hildebrand 2016, p. 35.

ordoliberalism is a constitutional framework that protects the process of competition. The state has a crucial role in creating and maintaining competition, as private companies are believed to ultimately have the tendency to restrict competition in various measures. As Hildebrand puts it, "economic freedom entails the potential for its own distruction."[229]

A central concept to ordoliberalism is the *economic constitution*, which defines the so-called rules of the game under which economic activities occur.[230] Ordoliberalists viewed that the pursued economic order, one that would promote common interests as well, could be achieved by formulating an economic constitution which would support this goal. Vanberg distinguishes a theoretical and a policy paradigm in ordoliberalist ideas. The *theoretical paradigm* operates on the premise that the characteristics of the economic constitution should be reflected in economic analysis. According to the *policy paradigm*, the economic constitution ('the rules of the game') should be developed by economic policy in order to achieve the desired economic order. Changes in the economic reality are thus sought by amending the constitutional framework, rather than by case-by-case intervention.[231]

4.2.3 Social Market Economy

A distinctive feature of the European school of thought is *the social market economy*, a developed version of ordoliberalism.[232] The social market economy can be traced back to the EU Treaties. The objectives in Article 3 SEU include inter alia the establishment of an internal market and the sustainable development of the EU, which is based on "a highly competitive social market economy". A social market economy combines the idea of market freedom and social objectives, such as *social equality and social fairness*. Hand in hand with these objectives, the social market economy aims to distribute wealth equally between all market actors, producers and consumers. The state has an active role in protecting the free market forces and pursuing social objectives, which the state executes by taking regulatory measures. Compared to the Chicago school, the European school thus addresses consumer interests in a holistic way that includes broader policy goals and social aspects.[233]

[229] Ibid., p. 36.
[230] *Ordnung* (order) is a central term in ordoliberalist literature. See Vanberg 2001, p. 39.
[231] Vanberg 2001, p. 40-41.
[232] Hildebrand 2016, p. 37.
[233] Ibid., p. 38-41.

Competition economics in the EU are based on a constitutional, predefined framework, namely the Treaties and the objectives which they have determined.[234] Out of the relevant competition provisions in the Treaties, especially Article 101(3) of TFEU stands out when it comes to the equality and fairness aspect. This exemption clause provides that agreements which would otherwise restrict competition, can be deemed lawful if it "contributes to improving the production or distribution of goods or to promoting technical or economic progress, while *allowing consumers a fair share of the resulting benefit*". This demonstrates the concept of fair wealth distribution, which is characteristic of the European school. In contrast, the Chicago school does not take a stand on how wealth should be distributed, and thus does not accept the predefined framework that is typical for the European school.[235]

As mentioned above, the achievement of a highly competitive social market economy is one of the objectives set out in Article 3(3) of TEU. The definition of this concept, or the means of achieving it, is not entirely unambiguous. The ECJ has not clarified its meaning, and the Commission has mostly made rather general remarks of it.[236] What is characteristic to the concept of a social market economy is the debate between the free markets Europe and the social Europe. The debate over the EU's functions is not new, yet it is still topical, as some advocate for a union that focuses on its "core task" of protecting the free market, while others argue for a social union that provides social protection. Despite the obvious dichotomy, the two should not be perceived as mutually exclusive options. After all, simply the inclusion of the term "social market economy" in Article 3(3) of TFEU implies that these objectives are compatible.[237]

4.2.4 The European Social Constitution and Social Model

A social market economy combines the ideology of a free market economy with social values.[238] What does the social aspect entail in a Union that was founded on the idea of economic integration? In certain decisions related to the freedom of movement rights, the ECJ has emphasized the social sphere of the Union.[239] Especially noteworthy in this regard is *AGET*

[234] Ibid., p. 23.
[235] The Chicagoans apply a *total surplus* standard, which ultimately means that they do not measure consumer welfare on how wealth is distributed, but how much wealth is distributed in total (regardless of who receives the wealth). See Ibid., p. 30-31.
[236] Smejkal 2015, p. 35.
[237] Claassen et al. 2019, p. 4.
[238] Hildebrand 2017, p. 1.
[239] See C-438/05, *Viking Line*, ECLI:EU:C:2007:772, para. 79 and C-341/05, *Laval*, ECLI:EU:C:2007:809, paras. 104 and 105. Both cases involve labour unions and employment questions.

Iraklis, where the ECJ addressed the issue of balancing social and economic interests. According to the Court, "[s]ince the European Union thus has not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement -- must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 151 TFEU, the promotion of employment, improved living and working conditions, -- proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion."[240]

Some guidance could be sought in European constitutionalism, namely the concept of a *European social constitution*. The Treaty provisions regarding social values and objectives, social rights and social policy competences[241] suggest that a social dimension could be distinguished from the European constitution. The concept of a European social constitution has been highly debated, as social welfare is largely a national matter, and the social provisions of the Treaties seem rather weak compared to the provisions that form the *economic constitution* of the EU.[242] However, Tuori argues that there is a social dimension to the European constitution, but it has to be assessed with regard to two characteristics: "the primacy of the national welfare state and subordination of the social to the economic constitution".[243]

The "social" in the social market economy could be studied by looking at *the European social model* (ESM), a concept that is discussed more in political rather than legal literature. The ESM depicts the relatively new social dimension of the European Union, originally and primarily an economic union. Although the Treaty of Rome contained social objectives, the provisions lacked practical measures to pursue them.[244] Without going into too much detail on the EU's history, the first Social Action Programme in the 1970's, as well as a social protocol annexed to the Maastricht Treaty of 1992, were among the significant developments that brought the EU towards a social union.[245] The ESM was especially advocated in the 1980s as a mutual tradition

[240] C-201/15, *AGET Iraklis*, ECLI:EU:C:2016:972, para. 77.
[241] See e.g. Articles 2, 3 and 6 TEU, and Title X (Social Policy) TFEU.
[242] Tuori describes the social constitution as a "constitutional underdog", mentioning that social policy provisions do not have direct effect or any monitoring or sanctioning system attached to them, unlike many economic provisions. See Tuori 2015, p. 228.
[243] Ibid., p. 229.
[244] Whyman et al. 2012, p. 1. Relevant social provisions of the Treaty include e.g. Article 117 regarding improved working conditions, and Article 119 regarding equal pay for men and women.
[245] Whyman et al. 2012, p. 2.

of social protection among EU member states. It has also been argued that the European Social Model was an alternative to the social market economy.[246]

The ESM is a somewhat vague concept: some authors dismiss the idea of a unified social model altogether and instead divide European countries into different welfare models, while other authors use the concept of ESM to describe the aspiration of social values in a more abstract manner.[247] Whyman et al. have developed a threefold definition, which depicts a competitive market economy, where social institutions and social solidarity play an integral part.[248]

The European Parliament has described the ESM as follows:

> "The European social model is first and foremost *a question of values*. Whatever European social system we examine we find the common values of equality, non-discrimination and solidarity and redistribution as fundamentals, with universal, free or cheap access to education and healthcare, and a variety of other public services as the right of a citizen and as essential to creating the basis for a successful modern economy and a fair society. It is in this respect that our European model differs from the US model for instance."[249]

The ESM can be further described by the criticism it receives from neoliberalist theorists. Neoliberalism, which is especially influential in U.S. antitrust policy, has a strong faith in the self-regulating markets. According to the neoliberalist approach, the markets will determine optimal wages and the level of employment. Intervening the operation of the markets with labour regulations, unemployment benefits, or other social measures that aim to support an individual in this respect, does not fit the neoliberalist thinking. Such measures could cause rigidity in the markets, increase labour costs and discourage work. As a response to the neoliberalist approach, theorists supporting the ESM believe that social measures may actually benefit the economy. For example, social measures might make it easier for a job applicant to find work best suitable for their skills, or to get further education to support their career, which ultimately may benefit the society as a whole.[250]

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[246] Claassen et al. 2019, p. 7.
[247] See e.g. Bilbao-Ubillos 2016, p. 113-114, Jepsen - Pascual 2006, p. 1 and Tuori 2015, p. 233.
[248] See Whyman et al. 2012, p. 4.
[249] The European Parliament report on a European Social Model for the future, 13 July 2006, p. 11. In literature, Vaughan - Whitehead divides the ESM into six pillars: 1) increased rights at work and improved working conditions, 2) universal and sustainable social protection systems, 3) inclusive labour markets, 4) strong and well-functioning social dialogue, 5) public services and services of general interest, and 6) social inclusion and social cohesion. See Vaughan-Whitehead 2015, pp. 3-10.
[250] Vaughan-Whitehead 2015, 13.

Based on the considerations above, the social aspect of the social market economy seems to emphasise labour and social aspects. On the other hand, the Parliament's definition of the ESM is more abstract, relying on values such as equality and redistribution. The juxtaposition of the ESM and neoliberalism emphasizes the nature of the European approach and its differences with the United States. Using the ESM as an example also demonstrates that the juxtaposition between the European and the U.S. approach goes beyond competition law. Although this notion might be obvious to some, it is necessary to emphasize in the context of this thesis. The wide systematic and ideological differences between the European Union and the United States, which will be elaborated in this chapter, further validate the reasoning that certain beliefs of the Chicago school do not fit the core of the European social market economy.

4.2.5 The European Economic Constitution

The social market economy can also be assessed by distinguishing a European economic constitution.[251] The term "economic constitution" was developed and mostly used in the ordoliberal tradition and is thus not an entirely undisputable concept.[252] As was mentioned earlier, the economic constitution includes the rules by which economic activities are conducted in a society.[253] It is formed by principles and norms which guarantee economic rights to citizens and businesses and impose obligations to the government. In practice, such provisions guarantee inter alia contractual freedom, private property rights, as well as free movement and undistorted competition within the internal market.[254]

Ordoliberals viewed that the economic constitution was maintained by *Ordnungspolitik* (order-based policy), which essentially means a set of policies reflecting the economic order envisioned by the economic constitution.[255] As part of the *Ordnungspolitik,* ordoliberals envisioned a *Ganzheitsbetrachtung*, (an integrated policy perspective), according to which individual economic decisions were considered in light of the economic constitution as a whole.[256] A distinction can be made between the micro-economic and macro-economic

[251] Tuori distinguishes an economic, social, juridicial, political and security constitution as different dimensions of the European constitution. See Tuori 2015, p. 319.
[252] Ibid., p. 127. For further remarks on the foundations of the "economic constitution", see Giocoli 2009, p. 771 and Bonefeld 2012, p. 638.
[253] See Vanberg 2001, p. 39
[254] Gerbrandy 2019, p. 128.
[255] Giocoli 2009, p. 772.
[256] Kingston 2012, p. 120.

constitution. Free movement rights and competition law form the core of the micro-economic constitution.[257] The macro-economic constitution entails monetary policy objectives, the entry criteria to the European Monetary Union, as well as national fiscal policy considerations.[258]

The concept of an economic constitution within a social market economy has two implications. For one, competition law and free movement laws are complementary elements of the same system, namely the micro-economic constitution. It could be thus argued that these two sets of the same system ought to be interpreted in a coherent manner.[259] Secondly, the economic constitution forms an integral part of the social market economy. Being a part of the micro-economic constitution, competition law should thus consider, or at least not contradict, societal objectives pursued within the social market economy.[260]

4.3 Comparison: U.S. Antitrust Theories

4.3.1 Background

The legislative core of U.S. antitrust law concludes of the Sherman Act, the Clayton Act and the Federal Trade Commission Act.[261] Antitrust law and policy in the United States is rooted in the idea of total welfare, which focuses on efficiencies in total, regardless of who receives the created benefits.[262] This premise is important to acknowledge as antitrust literature sometimes uses the term *consumer welfare* in a somewhat misleading manner. Bork, who is considered as one of the founders of the Chicago school, created the so-called "Chicago trap" by using the term *consumer welfare* when he was in fact referring to *total welfare*.[263]

As this thesis has a European perspective and the comparison to U.S. antitrust only has a complimentary role, it should be acknowledged that the "Chicago school's views" are difficult to portray exhaustively due to the scope of this thesis. The Chicagoan scholars are not

[257] Tuori 2015, p. 159.
[258] Ibid., p. 183.
[259] Kingston 2012, p. 120. Coherence will be assessed more thoroughly in chapter 5.1.
[260] Gerbrandy 2019, p. 128.
[261] Dunne 2016, p. 24.
[262] Jones - Sufrin - Dunne 2019, p. 11-12.
[263] For example, Bork considered that both the people who buy from monopolists and the monopolists themselves are consumers. Consumer welfare, in the Chicago school, is thus increased when either of these 'consumers' receive benefits. This logic clearly depicts the total welfare standard. See Hildebrand 2016, p. 30 and Bork 1993, p. 110.

completely unified in their views, on top of which the antitrust field in the U.S. is divided into more widely differing views which can be categorised into e.g. Chicago and Harvard school, not to mention the more recent theories which could be called post-Chicago or neo-Chicago theories.[264] The assessment of the Chicago school will rely largely to the views presented by Bork and Posner, since they both had a prominent role as judges, and both presented rather comprehensive views on the Chicago school.[265]

4.3.2 Harvard School and the SCP Paradigm

The so-called Structure – Conduct – Performance paradigm is an early idea of Harvard scholars, developed in the 1930s. It states that market structure affects a firm's conduct, and the conduct then determines economic performance. Bain, one of the leading scholars of the SPC paradigm, believed that most markets were too concentrated. The SCP paradigm thus represented a rather strict and interventionist approach to competition law.[266] In the Harvard school's early works, Mason suggested that economics should be used to distinguish socially desirable outcomes, thus contributing to public policy.[267] Even though the Harvard school of thought has its roots in the SCP model, its modern version is considered less interventionist.[268]

Compared to the Chicago school, the Harvard school's approach is more structuralist and focused more on whether companies have power to restrict competition, not whether they actually have the incentive to do so.[269] Harvard scholars also emphasise the future dynamic effects instead of short-term (allocative and productive) efficiency, the latter representing the Chicagoan approach.[270] Although many Harvard scholars agree with the efficiency approach, their main disagreement with the Chicago school is about whether the markets are self-correcting or not.[271]

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[264] To provide an example of this, there is debate in U.S. literature as regards what the legislators of the Sherman Act actually intended to promote as the objective of antitrust law, consumer or total welfare. See Dameron 2016 and Heyer 2006, p. 12.
[265] For a similar approach, see Bradford - Chilton - Lancieri 2020, p. 305. See also Hildebrand 2016, p. 23.
[266] Jones - Sufrin - Dunne 2019, p. 14. The SCP paradigm can also be used to describe the differences of Chicago and Harvard scholars, as both schools of thought interpreted the SCP paradigm in their own way. Whereas Harvard scholars would have condemned concentration in a certain market, Chicago scholars viewed that said concentration could be caused by significant efficiencies that undertakings with a large market share receive. See Geradin - Layne-Farrar - Petit 2012, p. 73.
[267] Mason 1937, p. 49.
[268] Jones - Sufrin - Dunne 2019, p. 14.
[269] See Evans - Padilla 2005, p. 76 and Bradford - Chilton - Lancieri 2020, p. 303.
[270] Kuoppamäki 2003, p. 29.
[271] Ibid., p. 121.

The Harvard school has had considerable impact on the development of EU competition law. For example, the role that market shares and the Herfindahl– Hirschmann Index play in EU merger control, demonstrate a Harvard approach.[272] In *Metro*, the ECJ referred to the maintenance of *workable competition*, a theory characteristic of the Harvard school.[273] The General Court has also stated that competition law aims to protect *market structure*, another essential element to the Harvard approach.[274]

4.3.3 The Chicago School

The loudest critics of Harvard school's SCP model were Chicago scholars, whose alternative model ultimately had a profound impact on competition law.[275] The *General Dynamics* and *Sylvania* cases are considered to have marked a turning point for the Chicago school. In *General Dynamics*[276], the Supreme Court raised the threshold for prohibiting horizontal mergers, and in *Sylvania*[277], the formerly negative attitude towards exclusive retail agreements shifted into a more allowing direction.[278]

The Chicago school's approach is rooted in neoclassical price theory.[279] The minimalist approach of the Chicago school argues that the markets will correct themselves, thus indicating that government intervention should remain minimal.[280] The Chicagoans thus focus on the functioning of the markets and not on competition itself. State intervention is considered harmful, unless it will almost certainly increase consumer welfare.[281]

The Chicagoans believe that antitrust policy should only focus on economic efficiencies. Therefore, there is no room for social considerations in the Chicago school.[282] In fact, Posner has stated somewhat straightforwardly that "[e]fficiency is the ultimate goal of antitrust."[283]

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[272] Kingston 2012, p. 22.
[273] See C-26-76, *Metro*, ECLI:EU:C:1977:167, para. 21 and Hildebrand 2016, p. 109.
[274] T-219/99, *British Airways*, ECLI:EU:T:2003:343, para. 264.
[275] The Chicago school had a significant impact on US antitrust in the 1970s and 1980s. The Chicago approach was reflected in e.g. new Merger Guidelines and new or amended doctrines in case law. See Bradford - Chilton - Lancieri 2020, p. 303-304.
[276] *United States v. General Dynamics Corp.*, 415 U.S. 486, 1974.
[277] *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 1977, p. 59.
[278] For further remarks on the Chicago school's ascent to power, see Kuoppamäki 2003, p. 171.
[279] Posner 1979, p. 932 and Bork 1993, p. 117.
[280] Bradford - Chilton - Lancieri 2020, p. 306.
[281] Hildebrand 2016, p. 25.
[282] Kuoppamäki 2008, p. 1081.
[283] Posner 2001, p. 29.

Bork's definition of efficiency includes both allocative and productive efficiency. According to his definition:

> "business efficiency necessarily benefits consumers by lowering the costs of goods and services or by increasing the value of the product or service offered."[284]

Judge Posner has affirmed the efficiency approach in a judgement by the Court of Appeals in 1986, where he stated that:

> "as the emphasis of antitrust policy shifted from the protection of competition as a process of rivalry to the protection of competition as a means of promoting economic efficiency [--] it became recognized that the lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors."[285]

According to Bork, the goal of antitrust is consumer welfare.[286] The protection of "small merchants", i.e. inefficient competitors, does not fit the Chicagoan idea of consumer welfare.[287] The Chicago school rejects the idea of redistribution of wealth (which represents a consumer surplus model) and instead promotes a total surplus model. The arguments supporting total welfare are mainly linked to the belief that the growth of the overall economy generates more wealth in total, and that any remaining wealth distribution issues may be solved through taxation or other governmental measures. Bork and Heyes also argue that if redistribution is based on the lesser or poorer position of consumers as opposed to producers, it would be difficult to determine this factor, not to mention that the assumption itself is problematic.[288] These ideas are in clear contradiction to the European school's principle of equal distribution of wealth.

The discussion on goals of antitrust is not entirely consistent or unified in the U.S., but the predominant ideas promote a so-called *laissez-faire* approach.[289] As for the role of judges and courts, Bork considered that they should not deduce market power simply from market shares (except for very high market shares). Furthermore, Bork viewed that judges should not evaluate

[284] Bork 1993, p. 7.
[285] *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 1986, p. 375.
[286] Bork 1993, p. 51. It should be noted, however, that the goal of consumer welfare in Bork's writing means total welfare. See Hildebrand 2016, p. 5.
[287] Bork 1993, pp. 64-65.
[288] See Heyes 2006, pp. 19-20 and Bork 1993, p. 112. For comparison, Cseres provides insightful views on the interdependent relationship between competition and consumer policy. See Cseres 2005, pp. 332-333.
[289] Hildebrand 2016, p. 5.

so-called trade-offs, i.e. how to distribute economic surplus between consumers and producers.[290] This is closely linked to the Chicagoan belief that false positives are costlier than false negatives.[291]

Despite the Chicago school's popularity in legal literature, the Supreme Court has not yet confirmed whether total welfare is the goal of U.S. antitrust or not. In light of case law, the question of welfare standards thus remains unclear.[292] An interesting finding is presented by Bradford et al., who argue that the Chicago school's influence worldwide is not as widespread as many would think.[293]

4.3.4 Post-Chicago and Neo-Chicago

Geradin et al. suggest that Chicago and Harvard schools represent two extremes on the spectrum of normative competition economics. To simplify, Harvard school saw an issue with all concentrated markets, whereas Chicago school was ready to assume all monopolies and oligopolies to be efficient.[294] The Post-Chicago school is situated somewhere between these two extremes, representing a more nuanced approach that acknowledges certain market imperfections and includes industrial organisation and game theory in its approach.[295]

In his assessment of the post-Chicago school, Hovenkamp acknowledges that post-Chicago scholars have successfully found that "the number and variety of anticompetitive practices are unknown and open ended, particularly in relatively new markets --".[296] Ironically, Hovenkamp finds that post-Chicago's weakness lies in the complexity of the market. An economic model that is too complex to administer will lead to more errors in the courts and make it difficult for legislators to formulate rules that properly represent such intricate theories.[297]

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[290] Bradford - Chilton - Lancieri 2020, p. 306.
[291] False positives are "type 1" errors which mean that lawful conduct is mistakenly condemned, whereas false negatives, "type 2" errors occur when anti-competitive conduct is not captured by antitrust enforcement. See Bradford - Chilton - Lancieri 2020, p. 306 and Barnard - Peers 2014, p. 516.
[292] Hildebrand 2016, p. 31.
[293] This empirical study also suggests that an increasing amount of scholars are criticising the Chicago school for the current state of U.S. antitrust law, which in their opinion needs revising. See Bradford - Chilton - Lancieri 2020, p. 329.
[294] Geradin - Layne-Farrar - Petit 2012, p. 74.
[295] The post-Chicago school's influence increased in the 1990s and 2000s, although the Chicago school's ideas still had relevance in case law. See Bradford - Chilton - Lancieri 2020, p. 304.
[296] Hovenkamp 2001, p. 268.
[297] Ibid., p. 336.

Neo-Chicago is a later approach that agrees on the Chicago school premises but considers the criticism and insights that Chicago and post-Chicago schools have received.[298] Many view that Neo-Chicago is not even a new school, but rather a developed version of the Chicago school. The vast discussion around different schools of thought has even led to meta-discussion on the labels that different schools are given. Many view that the labelling of different schools of thought leads to a too stark distinction between them, and ultimately gives a distorted and simplistic idea of the development of the U.S. antitrust system.[299] For the purposes of this thesis, different schools of thought have an essential role in depicting the nature of EU competition policy. Even though it is useful to acknowledge the simplistic nature of these "labels", the ideologies and the historical context of the different schools of thought are useful for assessing public policy considerations in relation to the European school of thought.

4.4 Fundamental Differences Between the Chicago and European School of Thought

The economics of the Chicago and European school can be assessed on a strategic, operational and tactical level. The strategic level represents the guidelines by which economic analysis is applied in practice, on the operational level. On the strategic level, a logical starting point is the *market concept* applied. The market concept is common ground for the Chicago and European schools, which is defined by Hildebrand as follows:

> "Competition among firms to obtain the backing of consumers spurs firms to produce these goods and services that are most highly valued by consumers at the lowest possible cost."[300]

What fundamentally separates these two schools on the strategic level is *distributional considerations*. In the EU, the redistribution of wealth is predetermined by the legal framework of the social market economy, which requires that the benefits of the market are distributed equally. The Chicago school, on the other hand, dismisses such a normative approach. Chicago scholars are also opposed to the European belief that the competitive process itself should be protected by government intervention.[301]

[298] Evans - Padilla 2005, p. 75.
[299] See e.g. Jones - Sufrin - Dunne 2019, p. 21; Kovacic 2007, p. 8-9; and Wright 2012, p. 271.
[300] Hildebrand 2016, p. 23.
[301] Ibid., p. 23.

The differences on the operational level are derivative of those on the strategic level. In the European school's approach, economic analysis on the operational level must comply with the framework of the social market economy, i.e. the premises on the strategic level. Economic analysis in the Chicago school is not affected by such predefined objectives, especially as regards the rule of reason approach, which is characteristic of U.S. antitrust law.[302] The European school and Chicago school thus have fundamental differences on the strategic and operational level. The tactical level is rather universal in economics, and therefore similar for both schools of thought.[303]

On a practical level, the Commission's approach to competition law does have some common ground with the Chicago school's views. The Commission's assessment of horizontal mergers seems to include elements of neoclassical theory, although the different welfare standards applied may impact the outcome of merger assessment significantly.[304] Certain elements of the Commission's approach may *prima facie* seem to depict Chicagoan views, for example in believing that a dominant position is not illegal per se, and that many anti-competitive conducts may be counterbalanced with efficiencies.[305] However, the Commission is much less lenient when it comes to monopolies and vertical agreements, as well as vertical or conglomerate mergers.[306]

Finally, the fact that the Commission must consider the single market objective and consumer surplus in its assessment, creates a fundamental difference between these two.[307] Despite the way that the EU has embraced economic analysis since the modernisation phase in the early 2000s, EU competition law remains essentially different from U.S. antitrust law.[308] The approach in EU competition law can be described as "maximalist", compared to the Chicago school's minimalism.[309]

I believe that the European school's background situates EU competition law in a fundamentally different framework, which is mostly reflected in the Treaties. To some extent, this "unique" framework is visible in competition enforcement as well, but I would argue that after the more economic approach, this framework has faded especially in the Commission's

[302] Hildebrand 2016, p. 24.
[303] Economic analysis on the tactical level is used to describe data and market facts. See Hildebrand 2016, p. 24.
[304] Bartalevich 2016, pp. 272-273.
[305] Ibid., pp. 274-275.
[306] See Bradford et al. 2019, p. 436 and Bartalevich 2016, p. 276.
[307] Whish - Bailey 2018, p. 23 and Hildebrand 2017, p. 8.
[308] Bradford et al. 2019, p. 436.
[309] Bradford - Chilton - Lancieri 2020, p. 312.

decisions. This might be due to the Chicago school's popularity, but I would emphasise that the European school ought to be assessed as its own distinct school of thought. This premise also supports the view that public policy considerations should be analysed in the context of the European social market economy, and its distinct features.

5 A Holistic or an Isolated Approach to Competition Policy?

5.1 Coherence

5.1.1 Coherence in Legal Theory

Looking at the EU's "constitutional" provisions[310], one notices that EU has a wide range of goals. Article 3 of TEU mentions inter alia the well-being of people, sustainable development, and improvement of the quality of the environment as the Union's goals. Article 7 of TFEU requires the EU to "ensure consistency between its policies and activities, taking all of its objectives into account". Furthermore, environmental protection requirements are specifically addressed by Article 11, which states that such requirements "must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development."[311]

What is the role of competition law in relation to these constitutional provisions? It could be argued that competition law cannot isolate itself from the constitutional provisions. Kingston and Gerbrandy have aptly pointed out that the Treaty system does not set the various objectives of Article 3 of TEU in any hierarchical order.[312] The question of whether competition rules should be viewed separately or in context of EU-wide objectives is closely related *coherence*, an idea of a unified and consistently systemised legal system.[313] Citing Townley,

> "This dispute, between those that read the competition rules in isolation and those that read the Treaty holistically, goes to the very heart of Treaty interpretation. It affects everything, from the substantive interpretation of individual provisions to the facility with which the Treaty can be applied, procedurally. Its resolution is vital for determining whether, in Article 81 cases, the Community decision-maker should be guided 'by one value or by several' goals."[314]

[310] The Founding Treaties of the EU are often perceived as the constitution of EU. For example, the ECJ has described EU law provisions as the EU's constitution. See Rosas - Armati 2018, p. 1-5.
[311] The same requirement can be found in Article 37 of the Charter of Fundamental Rights of the European Union.
[312] Kingston 2012, foreword; and Gerbrandy 2019, p. 137.
[313] Coherence is widely discussed in legal theory. For notions of coherence in the doctrinal study of law, see Aarnio 2011, p. 145-146.
[314] Townley 2009, p. 3.

Why is coherence relevant? Tuori considers that coherence is essential for forming a rational argument. To that end, coherence is inner consistency within the argument.[315] Sauter gives a threefold definition to coherence: the first two requirements are logical consistency and the forming of a unified and systematic whole. The third element combines the first two requirements, stating that they should "serve a clearly identifiable objective and/or set of principles". Sauter emphasizes that the goals of EU competition law are central for coherence, as the third requirement is closely linked to the teleological and goal-centred approach of the EU courts.[316]

Coherence is also linked to legal certainty. If *normative coherence*, the rationality of a single judicial decision, is viewed from a broader perspective, one needs to consider formal justice. Formal justice, or formal equality in the administration of justice requires that similar cases are decided in a similar manner, and vice versa. Formal justice guarantees *legal certainty and predictability*, thus connecting coherence to these principles.[317]

To give yet one more thought on the bigger picture, legal systems can be studied with legal dogmatic theories and reflexion theories. *Legal dogmatic theories* promote consistency in applying law, whereas *reflexion theories* view the law from an internal perspective. Reflexion theories ultimately aim to reflect on the identity of a legal system and portray the legal system as one whole unity.[318] According to Tuori, the unity of law has been described with two alternative lines of theory. On one hand, the legal positivist approaches of Hart and Kelsen trace the unity of law back to the hierarchy of norms.[319] On the other hand, Dworkin and Habermas argue that the unity of law is linked to the *coherence of principles*. Habermas considers that human rights and rule of law principles form the normative deep structure of modern law.[320] Dworkin's theory is based on *law as integrity*. This theory assumes that "propositions of law are true if they figure in or follow from the *principles* of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice". The adjudicative principle of integrity "instructs judges to identify legal rights and duties, so

[315] Tuori 2007 p. 123.
[316] Sauter 2016, p. 9.
[317] Tuori 2007, p. 124.
[318] Ibid., p. 121. These two theories were originally distinguished by Niklas Luhmann.
[319] Kelsen's theory is based on the basic norm (*Grundnorm*), which is the foundational norm in his hierarchical system. Hart explains law with the rule of recognition. See Hart et al. 2012, p. 101-102 and Tuori 2007, p. 122.
[320] Tuori 2007, p. 122.

far as possible, on the assumption that they were all created by a single author – the community personified – expressing *a coherent conception of justice and fairness*".[321]

MacCormick's normative coherence contains similar elements, as it argues that coherence is created by a consistent set of values and/or principles. The laws of a legal system should, according to MacCormick, be justified by these higher values and principles, which ultimately promote a satisfactory way of life.[322]

According to Tuori, coherence can be total or local. *Total coherence* aims for the unity of the legal system as a whole, whereas *local coherence* is a narrower conception describing coherence within a certain area of law. He considers EU law as an independent legal system, as the totality of it would be rather difficult to fit into the systemizations of national laws.[323] Tuori examines the systemisation of the legal system into different areas of law, stating that the traditional areas of law are no longer capable of creating coherence in the modern, fragmented and pluralist (national and supra-national) law. Instead, coherence in the modern society could be achieved with *principles which create unity*.[324] When different principles are balanced in judicial decision-making, the general principles of the legal culture become surface-level norms, which form the basis for construing the *decision norm* of the case at hand.[325]

5.1.2 Coherence in European Union Law

The writings of Sauter and Soriano are especially interesting since they study coherence from the EU's perspective, Sauter concentrating on EU competition law. Sauter makes a distinction between external and internal coherence. *External coherence* puts competition law in the context of European integration and the EU as a whole, and thus seems to correlate with Tuori's total coherence. *Internal coherence* has two subcategories. Type A internal coherence covers the system of EU competition law, whereas type B internal coherence includes enforcement and judicial review.[326]

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[321] Dworkin 2000, p. 225.
[322] MacCormick considers that there is "extensional equivalence" between values and principles, stating that "values are the product of a system of practical principles". See MacCormick 1984, p. 41, 53.
[323] Tuori 2007, p. 120.
[324] Ibid., p. 122.
[325] Tuori views that coherence can be demonstrated through the three levels of law: the surface level, legal culture deep structure. On the surface level, the coherence of legal norms is secured by legal principles, which are rooted in the legal culture or deep structure. Thus, Tuori considers legal norms to be coherent when they represent similar or compatible principles. These principles uphold inner consistency, and coherence. See Ibid., pp. 123-125.
[326] Tuori's local coherence seems to correlate with type A internal coherence. See Sauter 2016, pp. 9-10.

Sauter views external coherence mainly from the perspective of the internal market, which he aptly describes as "the motherload of EU law".[327] Sauter thus does not seem to argue for or against internal or external coherence – instead of an either/or approach, he depicts a concept of coherence, where both an external and internal perspective coexist as separate viewpoints. Compared to Tuori, he seems to narrow the concept of external coherence so much that it may coexist with internal coherence and is more achievable than Tuori's conception of total coherence. Furthermore, Sauter links effectiveness and legitimacy to coherence, stating that one should be able to evaluate EU competition law based on the underlying legal principles of the EU legal system as a whole.[328]

Soriano, on the other hand, makes a distinction between coherence in the legal system and coherence in legal reasoning. Coherence in *the legal system* aims to create consistency between all features of the legal system. In *legal reasoning*, coherence should be pursued through consistent arguments.[329] Soriano views that these two types of coherence are interwoven. Coherence in legal reasoning creates structures or chains of arguments which support the coherence of the legal system.[330]

Soriano argues that coherence can be understood as "base-dependent and pluralistic", in a way that makes sense of the diversity of law without distorting it. Instead of trying to create a tensionless system based on a single unifying set of principles principle, this approach accepts the plurality of values and the complexity of law and legal reasoning.[331] Soriano's arguments are based on the notion that that ECJ's decisions sometimes involve a conflict between "incommensurable goods", such as environmental protection and economic freedom. As such conflicting values cannot be evaluated with similar measures, legal arguments are used to justify a rational choice between the conflicting values.[332]

Soriano's model seems nuanced and is by nature different from the total/local theories of coherence. Soriano views that such theories correlate with her notion of coherence in the legal

[327] Sauter 2016, p. 258.
[328] Ibid., p. 261. Sauter also views this as an element of external coherence.
[329] Soriano 2003, p. 297.
[330] Although Soriano does not deny the significance of coherence in the legal system, her theory is focused on legal reasoning. See Soriano 2003, p. 300.
[331] Soriano 2003, p. 302.
[332] Ibid., p. 297. Sauter's theory is significantly different in this regard. According to him, balancing between different values (for example, when state aid is allowed for national environmental policy reasons) creates inconsistency. See Sauter 2016, p. 260.

system, but neither are about coherence in legal reasoning.[333] Coherence in the legal system could thus be compared to total coherence or external coherence, whereas coherence in legal reasoning would perhaps correlate with Sauter's type B internal coherence, but not with local coherence. Soriano's approach is quite different from Dworkin's, which seems to pursue a unified, globally coherent system, where values (or principles) do not collide.[334]

One line of arguments considers that law has become instrumentalised, meaning that it is used to pursue certain socio-political goals. When legal norms implement varying goals that are dependent on the shifting political environment, coherence becomes impossible to achieve.[335] Coherence could be deemed significant for competition policy, as consistency is essential for creating legitimate and effective policies.[336] Sauter views public policy exceptions especially problematic for coherence, noting that public policies separate state aid and sectoral competition policy from other areas of competition law.[337] A counterargument to this is based on Dworkin's distinction between principles and policies. Policies pursue the socio-political goals described above, legal norms do not. Legal principles connect law with moral aspects and create coherence.[338] Dworkin's counterargument could be further supported by Soriano's insights on balancing between different values with rational legal argumentation.

A linkage to legal certainty and the rule of law can be found in Raitio's argumentation. Raitio emphasises the balance (or imbalance) between the principle of effectiveness on one hand, and legal certainty and rule of law on the other.[339] The principle of effectiveness is ultimately rooted in the internal market goal, whereas legal certainty and the rule of law are inalienable principles of the sovereign member states, situated in the deep structures of law. The balancing between such different principles is thus problematic.[340] Raitio argues that the ECJ has given emphasis on the principle of effectiveness especially in cases regarding economic continuity.[341]

[333] Soriano 2003, p. 305.
[334] Ibid., p. 304.
[335] Tuori 2007, p. 127.
[336] Sauter 2016, p. 260.
[337] Ibid., p. 259.
[338] Dworkin 2000, p. 223-225. Dworkin has received criticism from Posner 2006.
[339] Raitio 2019, p. 59. The principle of effectiveness in this context does not refer to effective competition, but to an EU-wide principle, according to which national procedural law cannot make it impossible to enforce rights based on EU law. See C-33-76, *Rewe-Zentralfinanz and Rewe-Zentral v Landwirtschaftskammer,* ECLI:EU:C:1976:188, para. 5 and C-106/77, Simmenthal, ECLI:EU:C:1978:49, para. 22.
[340] Raitio 2019, p. 65.
[341] Ibid., p. 65-66.

The tension between effectiveness and legal certainty is visible in *Skanska*, the so-called asphalt cartel case. One of the questions referred to the ECJ was whether the concept of undertaking is defined in accordance with public enforcement cases, applying the principle of economic continuity.[342] The ECJ emphasised that "the right to claim compensation for damage caused by an agreement or conduct prohibited by Article 101 TFEU ensures the *full effectiveness* of that article" and concluded that the concept of undertaking has to be interpreted in accordance with the imposition of fines.[343] Weighed against legal certainty, the ECJ argued that it can restrict the rights guaranteed by the effectiveness principle only in exceptional circumstances.[344]

According to Advocate General Wahl's opinion, a similar interpretation of the concept of undertaking in public and private enforcement is rational, since both public and private enforcement have the same function: "to deter undertakings from engaging in anticompetitive behaviour." Wahl also argued that "public and private enforcement of EU competition law together form *a complete system of enforcement*, albeit with two limbs, that should be regarded as a whole."[345] In addition to emphasising the principle of effectiveness, Wahl's argumentation seems to support local coherence, i.e. coherence within EU competition law. In fact, the decision seems rational in the context of local coherence.

When it comes to balancing effectiveness with legal certainty, the ECJ's argumentation seems to put notably more weight on effectiveness, since legal certainty was only considered to form a narrow exception in this case. Considering that these principles stem from fundamentally different dimensions of the legal system, Soriano's idea of coherent legal reasoning could perhaps provide some stability to such balancing. Effectiveness and legal certainty could in certain cases be perceived as incommensurable principles which cannot be measured by the same metrics, and thus rational legal argumentation could justify a decision between these two. It would be premature to draw conclusions based on one specific case, but the *Skanska* decision certainly demonstrates the tension between the principles of the EU, and provides an interesting, practical perspective to the question of coherence.

[342] C-724/17, *Skanska*, ECLI:EU:C:2019:204, para. 22.
[343] Ibid., paras. 43 and 47.
[344] According to the Court, "it is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict, for any person concerned, the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith." See Ibid, para. 56.
[345] Wahl also described public and private enforcement to be complimentary and to constitute "composite parts of a whole". See Opinion of Advocate General Wahl in C-724/17, *Skanska*, ECLI:EU:C:2019:100, paras. 76 and 80.

5.1.3 Coherence Through the Constitutional Articles of the Treaties

Returning to the constitutional provisions of the Treaties, a relevant question is whether competition law should contribute to the wide range of objectives set in the Treaties. On the surface, the argument of total coherence seems appealing. After all, why should one area of EU law be completely isolated from certain objectives that are at the very core of the Union? On a more practical level, can all of the EU's objectives be efficiently pursued, if the various policies are not designed to support each other? A more comprehensive assessment of coherence shows that the question is bound to be complex in an extremely multidimensional legal system such as the EU.

The assessment above has demonstrated the widespread discussion around coherence. It is clear, that coherence can be explained with varying theoretical structures and viewed from different perspectives. Coherence in law is often argued to be achievable through a set of principles expressing common values or objectives.[346] Despite the varying views on how coherence in the legal system should or could be achieved, most scholars seem to agree that coherence in legal decision-making is important.[347] This is especially true for Soriano, as her theory is centred around coherence in legal reasoning. On a more practical level, consistency in EU law could be pursued with "clear objectives, boundaries, rules, exceptions, procedures, and remedies, as well as the application of general principles of EU law."[348] Sauter points out that the ECJ has not provided a coherent approach as regards EU competition law's objectives (especially consumer welfare), and exceptions such as public policy interests. The single market objective, on the other hand, does create coherence as it has been consistently promoted in the ECJ's decisions.[349]

Another argument stems from political science and is focused on good governance. A system that pursues multiple policy objectives will function more efficiently, if the various objectives are acknowledged in all parts of governance. This argument relies on coherence, which is an

[346] For example, Tuori seems to dismiss the possibility of total coherence and considers that it is possible to pursue local coherence through general doctrines. He recognises that coherence can be viewed from an internal or an external perspective, both representing differing views on coherence. See Tuori 2007, p. 131.
[347] Tuori views this to be essential for the principles of formal justice, predictability and legal security. See Tuori 2007, p. 310 and UN Report on the Fragmentation of International Law (finalized by Martti Koskenniemi), para. 491.
[348] Important legal principles, according to Sauter, include "effectiveness and equivalence, pre-emption, proportionality, and -- the rights of the defence." See Sauter 2016, p. 258.
[349] Sauter 2016, p. 263-264.

essential part of good governance theory.[350] Good governance is not only a theoretical ideal but a concrete objective set in the Commission's White Paper on European Governance, according to which the EU must start "establishing more coherence in its policies so that it is easier to see what it does and what it stands for."[351] From this perspective, isolating competition policy from e.g. environmental concerns could be regarded to go against principles of good governance.[352]

5.1.4 Coherence and Public Policy Considerations

The policy-linking provisions in the Treaties, namely Articles 7 and 11 TFEU, send a clear message: EU policies should support each other, and especially environmental policy, including sustainable development, should be integrated in the Union's policies and activities. These articles seem to promote total coherence, yet many scholars view such a multitude of values to erode coherence within EU law. To conclude, one line of arguments seems to disapprove of the instrumentalised use of policies, and instead prefers to rely on legal principles, such as effectiveness and proportionality, to create coherence. I agree with this line of arguments to the extent that consistent application of key legal principles of EU law will surely promote formal justice and legal certainty, especially at the level of judicial decision-making and legal reasoning.

However, this notion alone might not capture the various values which Article 3 TEU, for example, includes. Using MacCormick's approach as a premise, laws are justified by higher values and principles, which ultimately promote *a satisfactory way of life*. I would argue that peace, well-being, justice and equality, among the other goals of Article 3 TEU, ultimately promote a satisfactory way of life and to that end, could create coherence. Furthermore, the objectives set in the Treaties are rather permanent and much less instrumental compared to policies.

I agree with Soriano's notion of colliding values, and consequently find Dworkin's idea of a single, unifying set of principles, difficult in the context of the EU. The various objectives of the EU will occasionally collide as it is quite difficult to balance values such as economic freedom and environmental concerns (or, as the *Skanska* case demonstrates, legal principles such as effectiveness and legal certainty). Past cases have shown that such collisions are

[350] Kingston 2012, p. 126.
[351] Commission White Paper on European Governance, COM(2001) 428, p. 1.
[352] Kingston 2012, p. 126.

inevitable, and to that end I agree with Soriano's theory of *pluralistic coherence*. Rational legal reasoning can justify a choice between incomparable interests, although it requires a clear set of goals, rules and exceptions to support it. I believe that a situation where no such collisions occurred, would only create ostensible coherence on the level of legal decision-making. Such an "ideal" situation could only be achieved by dismissing certain values altogether, which seems problematic to say the least.

To conclude, some notions on coherence could be made based on the theories studied above. On a somewhat abstract and fundamental level, laws are justified by values and principles which promote a satisfactory way of life, and simultaneously create coherence. One way of interpreting this premise is to consider Article 3 TEU to reflect these values. Applying legal principles of the Union in a consistent way will promote formal justice and predictability. When certain principles, values or objectives collide, rational legal reasoning can be used to justify a choice between colliding interests.

Finally, the theme of this chapter – whether competition law should be applied in a holistic or an isolated manner – is a question of total or local coherence. I would consider local coherence a logical starting point, as it would seem illogical to compulsively pursue total coherence at the expense of individual areas of law. However, I would argue that total coherence should not be dismissed merely because it seems impossible to achieve. Although in some instances it seems that one should choose between total or local coherence, I am inclined to believe that both could be pursued simultaneously. As mentioned earlier, the uncertainty regarding the objectives of EU competition law is somewhat of an obstacle in this regard. Setting clear objectives for competition law would promote to the pursuit of both total and local coherence.

5.2 Consumer Welfare in a Social Market Economy

5.2.1 Distributing the Fair Share of Benefits

Considering public policy issues more widely in competition law might require some type of recalibration of the way consumer welfare is measured. The predefined distribution of wealth, as dictated in Article 101(3) TFEU, is assessed in this section from two perspectives. Firstly, the requirement of "fair share of benefits to consumers" is evaluated by asking whether benefits to the whole society are beneficial for individual consumers. Secondly, this idea is further developed by considering long-term benefits to consumers and the society.

Consumer welfare is not mentioned in the EU treaties, not even in the competition provisions. Starting from a clean slate, so to speak, consumer welfare should be assessed in light of the Treaties. Holmes argues that assessing the goals of competition law (and the definition of consumer welfare) should be based on the Treaties and their constitutional provisions. This premise leads to the conclusion that there also other than simply economic considerations to be taken into account in EU law, and thus EU competition law.[353] In other words, this approach calls for total coherence in the interpretation of consumer welfare.

One way to assess a more holistic interpretation of consumer welfare is to assess whether *benefits to the society* could generate benefits to the consumers within the meaning of Article 101(3). A recent, concrete example of such an interpretation can be found in the Dutch competition authority's sustainability guidelines. According to the guidelines, Article 101(3) TFEU can be interpreted by *weighing societal benefits against the harm suffered by consumers*. Especially environmental damage agreements may be allowed due to the benefits they bring to the society, but in certain cases it is required that the benefits to society outweigh the disadvantage to consumers (the end-users of the product at hand).[354] Another significant consideration in this regard is the *counterfactual*: if a sustainability agreement is prohibited, the society as a whole might suffer from the environmental impact, whereas a potentially small group of consumers would reap the benefits.[355]

Another way to re-evaluate the fair share of benefits is to assess the temporal dimension of consumer welfare. In this regard, it is central to ask whether consumer welfare is measured in short-term price effects only, or if competition assessment could take into consideration the *long-term effects* to social welfare. There seems to be some room for considering long-term effects under the current regime.[356] However, assessing long-term effects is in general viewed as difficult.[357] Another relevant question is how much weight long-term or short-term effects are given, and how they are balanced against each other. This is especially relevant for sustainability considerations, since sustainability agreements between undertakings might lead

[353] Holmes 2020a, p. 1-3.
[354] ACM draft guidelines on sustainability agreements, paras. 41-42.
[355] Snoep 2020.
[356] For example, assessing Article 101(3) TFEU could involve long-term considerations. In merger control, assessing innovation requires a long-term perspective. See Commission General Guidelines 2004, paras. 44, 58, 92 and Commission Merger Guidelines 2004, para. 38.
[357] Holmes 2020c, p. 36.

to short-term price increases, although they could achieve significant societal goals on the long run.[358]

A few explicit examples of long-term effects can be found from case law. In *British Airways*, the General Court assessed an abuse of dominant position and concluded that competition law is focused on "protecting the market structure from artificial distortions because by doing so the interests of the consumer *in the medium to long term* are best protected."[359] Another type of example can be found from *BPCL/ICI* and *ENI/Montedison*, which are restructuring agreements exempted by the Commission on grounds of Article 101(3) TFEU. In both cases, the Commission concluded that allowing the restructuring agreement would bring long-term benefits to consumers, since it would allow the parties to finance new investments as well as research and development.[360]

In *PreussenElektra*, Advocate General Jacobs considered the balance between economic and environmental interests as follows:

> "harm to the environment, even where it does not immediately threaten - as it often does - the health and life of humans, animals and plants protected by Article 36 of the Treaty, may pose a more substantial, if *longer-term, threat to the ecosystem as a whole*. It would be hard to justify, in these circumstances, giving a lesser degree of protection to the environment than to the interests recognised in trade treaties concluded many decades ago and taken over into the text of Article 36 of the EC Treaty, itself unchanged since it was adopted in 1957."[361]

Although *PreussenElektra* is about the free movement of goods and not competition law, it is still relevant to the extent that it balances economic interests with environmental protection. The possibility of assessing long-term effects is especially relevant for environmental protection, as climate change is ultimately a long-term challenge. One rather straightforward but appealing (and accurate, in my opinion) argument for environmental considerations is

[358] See e.g. ACM analysis in *Chicken of Tomorrow.* ACM/DM/2014/206028, p. 8.
[359] T-219/99, *British Airways*, ECLI:EU:T:2003:343, para. 264.
[360] See IV/30.863, *BPCL/ICI*, para. 36 and IV/31.055, *ENI/Montedison*, para. 33. It must be noted that these so-called crisis cartels are a rather specific example situating in an exceptional time and environment.
[361] Opinion of Advocate General Jacobs, C-379/98, *PreussenElektra*, ECLI:EU:C:2000:585, para. 232.

presented by Simon Holmes: "First, we have to apply the law as set out in the treaties. If that is difficult, so be it."[362]

5.2.2 Consumer Well-Being

The discussion around consumer welfare could be widened to a question of whether consumer welfare should be interpreted more widely, as *consumer well-being*.[363] The concept of consumer well-being is not entirely new to EU competition law. Well-being is, in fact, one of EU's goals mentioned in Article 3(1) of the Lisbon Treaty.[364] Commissioner Vestager has stated that "[t]he strongest incentives remain consumers' demand and competitive markets. These are the main factors that push companies to bring new products and services to the market, create wealth, and *improve our well-being*."[365]

The ECJ has referred to well-being in competition cases multiple times. In *Hoescht*, the Court of Justice gave the following statement:

> "The function of [competition] rules is, as follows from the fourth recital in the preamble to the Treaty, Article 3(f) and Articles 85 and 86, to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers."[366]

In *Roquette Frères*, the court stated that competition rules aim to ensure "*economic well-being in the Community*."[367] In *TeliaSonera*, a more recent case from 2011, the court gave an almost identical description:

> "[t]he function of those rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring *the well-being of the European Union*."[368]

[362] Holmes 2020c, p. 36. A similar notion has been made by Commissioner Kroes: "we cannot just wash our hands of responsibility and say that competition law cannot or should not protect the consumer against negative medium to long-term effects just because it is difficult to assess." See Kroes 2005.
[363] Wasastjerna 2019, p. 185.
[364] According to Article 3(1), "[t]he Union's aim is to promote peace, its values and the well-being of its peoples."
[365] Vestager 2015b.
[366] Joined Cases C-46/87 and 227/88, *Hoechst*, ECLI:EU:C:1989:337, para. 25.
[367] C-94/00, *Roquette Frères*, ECLI:EU:C:2002:603, para. 42.
[368] C-52/09, *TeliaSonera*, ECLI:EU:C:2011:83, para 22.

A noteworthy difference between these last two cases is that in *TeliaSonera* the court excluded the term 'economic' and simply referred to the well-being of the European Union. Another significant case in this regard is *Österreichische Postsparkasse*, according to which "the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase *the well-being of consumers.*"[369]

In legal literature, consumer well-being refers to a concept broader than consumer welfare. Consumer well-being is argued to entail multidisciplinary values and to require the accommodation of social, political and moral values.[370] Despite the ECJ's notions of well-being in case law, it seems that the Commission has over time begun to utilise the term *consumer welfare*, which is by nature a narrower concept. Consumer well-being is a broad, somewhat abstract term, whereas consumer welfare seems to be more economically oriented.[371]

Well-being is defined by Merriam-Webster Dictionary as "the state of being happy, healthy, or prosperous".[372] The OECD Well-being Framework divides wellbeing into two categories. *Material conditions* include income and wealth, work and job quality and housing. *Quality-of-life factors* include health, knowledge and skills, subjective well-being, environmental quality, safety, social connections, civic engagement and work-life balance.[373] It is noteworthy that material conditions, i.e. economically measured factors, cover less than half of the various dimensions of the well-being framework.

To gain a deeper understanding of the meaning of well-being in the European context, I have compared several different language versions of the word "well-being" in three different contexts: Article 3(1) TFEU, *Österreichische Postsparkasse*[374] and *TeliaSonera*[375].

[369] Joined Cases T-213/01 and T-214/01, *Österreichische Postsparkasse*, ECLI:EU:T:2006:151, para. 115.
[370] See e.g. Wasastjerna 2019, p. 185 and Stucke 2012, p. 595.
[371] Ezrachi 2018, p. 5.
[372] "Well-being", Merriam-Webster.com Dictionary.
[373] OECD: How's Life? 2020: Measuring Well-being 2020, p. 20.
[374] Joined Cases T-213/01 and T-214/01, *Österreichische Postsparkasse*, ECLI:EU:T:2006:151, para. 115.
[375] C-52/09, *TeliaSonera*, ECLI:EU:C:2011:83, para 22.

Language version	**Article 3(1) TEU**	***Österreichische Postsparkasse***	***TeliaSonera***
English	well-being	well-being	well-being
Finnish	hyvinvointi	hyvinvointi	hyvinvointi
Swedish	välfärd	välbefinnande	välståndet
German	Wohlergehen	Wohlergehen	wirtschaftlichen Wohl
French	bien-êtr	bien-êtr	bien-êtr
Spanish	bienestar	bienestar	el bienestar económico

Looking at the first two sources, the translations of well-being are otherwise similar except for the Swedish variables *välfärd* and *välbefinnande*. All language versions can be translated roughly as well-being, except for the Swedish word *välfärd*, the meaning of which is closer to welfare. The German, Spanish and Swedish language versions in *TeliaSonera*, on the other hand, depict a more economically oriented concept of well-being. *Wirtschaftlichen Wohl* and *bienestar económico* are translated quite clearly as economic well-being, and *välståndet* could be translated as welfare or prosperity.[376]

In more recent case law, the General Court has made references to *TeliaSonera* in *CK Telecoms* and *Servier SAS*. In both judgements, the language versions listed above contained the same words as in *TeliaSonera*, thus depicting a more economically oriented conception of well-being.[377] Based on the language versions studied above, it thus seems that the judgements of EU courts have over time given a more economically oriented interpretation of well-being within competition law. This could be a logical consequence of the more economic approach and thus a way to distance competition law from the more general notion of well-being in Article 3(1) TEU. On the other hand, the more economically oriented translations of well-being could be intended to by synonymous with consumer welfare. Despite the slight nuances in the different translations of well-being, I would argue that well-being, as expressed in Article 3(1) TEU is of the essence in this regard.

[376] Translated with MOT Kielipalvelu. Dictionaries used: MOT Pro English ("well-being"), MOT Pro Swedish ("välfärd", "välbefinnande", "välståndet"), MOT German ("Wohlergehen", "Wirtschaftlichen Wohl"), MOT French ("bien-êtr") and MOT Spanish ("bienestar", "bienestar económico").
[377] T-399/16, *CK Telecoms*, ECLI:EU:T:2020:217, para. 93 and T-691/14, *Servier SAS*, ECLI:EU:T:2018:922, para. 238. The language versions were similar with the exception that in *CK Telecoms*, the German translation was not available.

Studying the U.S. antitrust regime, Stucke argues that "competition policy in any democracy with reasonable pluralism cannot be reduced to a single, well-defined goal." He considers that the U.S. has failed in pursuing a single economic goal. Pursuing well-being requires that competition policy balances economic, social, political and moral objectives.[378] The rationale for pursuing well-being has is closely linked to the research of happiness, a topic discussed in various disciplines from psychology to economics and jurisprudence.[379] Happiness research has shown that economic benefits increase well-being only to a certain extent.[380] Using OECD's categorisation, material factors increase overall well-being especially in developing countries, where increases in economic wealth are needed to cover very basic needs. However, once people can satisfy their basic needs, an increase in material factors does not increase well-being. In countries with higher living standards, overall well-being is said to increase more by focusing on quality-of-life factors.[381]

Combining public policy considerations with the concept of consumer well-being provides a new angle to the idea of non-competition goals in competition law. If the objective of consumer welfare was understood more widely as consumer well-being, competition law could aim to improve both material and quality-of-life conditions. Multiple aspects of the OECD's well-being framework could be considered as public policy interests as well. Certain material factors, such as work and job quality, could be pursued through employment policy. Many quality-of-life factors, such as knowledge and skills, health and environmental quality, could be translated into public policies as well. If public policy interests were pursued through consumer well-being, public policy considerations could be understood *not only as an exception or a restriction to the application of competition rules, but as a goal of competition law*, which reflects a broader understanding of consumer welfare. I acknowledge that this approach poses significant practical difficulties, but at least on a theoretical level provides a new perspective to public policy considerations.

A more modest approach would be to introduce quality-of-life factors to the competition rules. There are already suggestions on regarding sustainability as non-price factor that may lead to improved quality, more innovation and more choice.[382] Another alternative is to assess quality-

[378] Stucke 2012, p. 624.
[379] Ibid., p. 2578.
[380] Life satisfaction tends to rise at low levels of income, but once GDP per capita exceeds $12,000, life satisfaction only increases little or not at all. See Kahneman 2006, p. 1909.
[381] Of course, material factors are a pre-condition for promoting well-being through quality-of-life factors, and thus an important aspect of well-being in the big picture. See Stucke 2013, p. 2626.
[382] Volpin 2020, p. 13.

of-life factors in the interpretation of Article 101(3) TFEU. This might require that the economic requirements for this exemption are loosened, or that the conception of fair share of benefits is broadened to include certain benefits to the society.

Although there are no clear and easy tools for promoting consumer well-being, the literature and research regarding well-being and happiness provide sound reasons for pursuing them. To quote a popular idiom, money cannot buy happiness (after a certain threshold of economic welfare, at least). From this perspective, promoting overall well-being through public policy goals is not simply a romanticised and abstract goal, but is based on well-founded reasoning. In the context of competition law, the crucial starting point is defining the goals of competition law. Returning to the ECJ's argumentation in *TeliaSonera*, competition rules are stated to protect not only individuals and undertakings, but also *the public interest*, and overall the well-being of the European Union.[383] Furthermore, if our understanding of well-being has improved with happiness research, should we not interpret well-being accordingly?

5.3 Balancing Economic Efficiency with Public Policy Considerations

5.3.1 Competition Theory from a Contextual Perspective

Economic analysis is often considered as a stable and reliable way of assessing competition matters. However, economic theories are not unambiguous. They are inherently linked to the time and place at where they exist and could thus be described as *context-bound*.[384] Furthermore, there is no single "almighty" economic theory that would fit any economy at any given time. Chang, for example, distinguishes at minimum nine different schools of thought. It can also be argued that economics is ultimately not a value-free science. In this sense, economic theories differ significantly from natural sciences.[385] As Kuoppamäki has noted, the important question is not whether economic theory is applied or not, but *whose* economic theory is applied.[386] As chapter 4 demonstrated, there are lively debates about different economic theories and their strengths or weaknesses, as well as their applicability to competition law. This discussion in itself describes the nature of economic theories.

[383] C-52/09, *TeliaSonera*, ECLI:EU:C:2011:83, para 22.
[384] See e.g. Chang 2015, p. 52, Stucke 2012, p. 609 and Hildebrand 2016, p. 90.
[385] It should be noted that neo-classical theorists argue economics to be value-free. See Chang 2015, p. 113-114.
[386] Kuoppamäki 2003, p. 102.

On a practical note, econometric models may lead to differing results depending on how they are configured and applied in practice.[387] Furthermore, the excessive use of economic analysis may not always be the best solution in terms of effective enforcement of competition law. Advocate General Kokott brought this out in *Post Danmark II*, stating that "the added value of expensive economic analyses is not always apparent and can lead to the disproportionate use of the resources of the competition authorities and the courts, which are then unavailable for the purposes of effectively enforcing the competition rules in other areas." She also emphasised that corporate data is often subject to differing interpretations and is not always reliable.[388]

A certain degree of contextuality can also be seen in competition law and the way in which competition economics are applied. Hart describes law as a *social construct* that reflects its social, political and cultural environment and the values of said jurisdiction.[389] Competition economics, and the tools chosen to assess competition may thus vary depending on the country.[390] Consumer welfare and efficiency are good examples of concepts that are common in competition law language, but in practice are interpreted and applied in different ways, depending on the jurisdiction or legal culture in question.[391]

Ezrachi metaphorically portrays competition law as a *sponge* that absorbs the political, social and cultural realities surrounding it.[392] Economic considerations are a "membrane" surrounding and limiting the absorbent qualities of the sponge, and thus stabilising competition law.[393] However, this membrane should not be considered as static and unchanged. If the qualities of the membrane, i.e. the economic theories regarding competition, change, consequently one would assume that this would also affect the absorbent qualities of the sponge, and ultimately which surrounding realities are addressed in competition law, if any.

I do not intend imply that economic theories should not be used in competition law. On the contrary, I acknowledge that economic theories provide useful insights on how the economy operates, and different econometric models offer useful tools and benchmarks for competition

[387] Opinion of Advocate General Kokott, C-265/17 P, *UPS*, ECLI:EU:C:2018:628, para. 39.
[388] Opinion of Advocate General Kokott, C-23/14, *Post Danmark II*, ECLI:EU:C:2015:343, paras. 66 and 67.
[389] Hart - Bulloch - Raz 1994, p. 116.
[390] One might point out that this may not serve the global sphere of competition law, which could benefit from the global convergence of competition rules. However, Fox argues that within the "kaleidoscope of antitrust", differences between jurisdictions ought to be respected and instead focus on developing conflict resolution rules to overcome such issues. See Fox 2002, p. 602-603.
[391] Ezrachi 2017b, p. 61.
[392] Ibid., p. 51.
[393] Ibid., p. 59.

analysis. What I wish to emphasise with the contextual remarks on economic theory and competition law is the notion that competition law (as law in general) is bound to change over time. One possible example of this is the notion of non-economic or non-competition objectives. What we consider to be non-economic is based on the assumption that we are incapable of measuring a certain value in economic terms. Sustainability is one example in this regard: it is often considered a non-economic interest, yet it has been suggested that many aspects of sustainability could be measured in economic terms.[394] From a broader perspective, what we conceive as a competition-related goal is also dependent on our conception of competition and the economic theories beneath it. Similarly, if current economic analysis is incapable of measuring certain values that are considered relevant for competition policy, should we not at least discuss alternative ways of measuring them?

5.3.1 Plurality of Values vs. Efficiency

The plurality of values in EU competition law can be understood through the goals of competition law, or more broadly as the wider values of the European Union. From the perspective of competition law per se, the ECJ has emphasised that competition rules aim to protect "not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such."[395] On a broader level, the ECJ has stated that the competition rules aim to "prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union."[396] The ECJ has thus given a rather broad interpretation of the objectives of competition law.

The values and objectives of the Union are by no means merely political or ideological notions. The ECJ has referred to the constitutional articles of the Treaties in *Viking Line* and *Laval*, both cases where the court aimed to emphasise the social dimension of the Union.[397] These cases and a closer look at the constitutional provisions of the Treaties support the view that multidisciplinary values could be considered in competition law without amending the

[394] See the discussion in chapter 3.3.3.
[395] See C-8/08, *T-Mobile Netherlands*, ECLI:EU:C:2009:343, para. 38 and Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline*, ECLI:EU:C:2009:610, para. 63.
[396] C-52/09, *TeliaSonera*, ECLI:EU:C:2011:83, para 22.
[397] C-438/05, *Viking Line*, ECLI:EU:C:2007:772, para. 79 and C-341/05, *Laval*, ECLI:EU:C:2007:809, paras. 104 and 105.

Treaties.[398] A challenging question in this regard is whether these values should be considered in competition law, and how they should be balanced against colliding interests.

From a holistic perspective, it could be emphasised that the EU is a Union of *multiple values and objectives*, on some occasions overlapping or colliding. Fitting public policy considerations into the framework of competition rules would promote to the pursuit of the wider goals and values of the EU but would simultaneously pose certain challenges as to how to balance between these objectives. From the perspective of competition law, another relevant question is how such wider objectives can co-exist with the efficiency goal of competition law. In other words, can non-economic or non-competition goals promote economic efficiency in some way, or can the benefits from such objectives prevail over the economic benefits in some cases?

The emphasis on economic efficiency in competition law ultimately depicts the effects-based assessment, which gained popularity after the modernisation of EU competition law. Thus, considering the wider values and objectives of the Union in competition law also entails a shift of emphasis from a solely effects-based approach to a more holistic approach, which considers objectives as well. Whether such a hybrid approach is possible, entails questions that go to the very core of competition law.

[398] Gerbrandy 2019, p. 137.

6 Conclusions

My research question, introduced in the beginning of this thesis, concerns the role of public policy considerations in EU competition law, especially from the perspective of the European school of thought. This topic covers multiple different dimensions and themes, out of which I have aimed to recognise and analyse the most central ones. A primary issue I have ran into during my research is that the objectives of EU competition law remain somewhat unclear. A central notion in this regard is the dichotomy between the Commission and the ECJ. Although the Commission has actively developed competition law and embraced the effects-based approach, it seems that the ECJ has neither accepted nor refused this approach explicitly.

Studying various public policy considerations with case law and legal literature demonstrated the wide policy shift which the modernisation of EU competition law has initiated. Several judicial decisions from the "old" competition regime support the premise that public policy considerations are possible within the current Treaty framework. It is relevant to note that some decisions from that time received heavy criticism, partly due to the growing demand for economic analysis in competition enforcement. Now that economic analysis is a central part of competition analysis, I believe it is necessary to consider how economics could contribute to the discussion around public policy considerations. Sustainability is a recent example of an area where economic analysis could be utilised, and thus the notion of public policy considerations does not always have to entail a choice of whether economic analysis should be dismissed to accommodate other interests. The questions of evaluating certain public policy considerations in economic terms, as well as practical research on accommodating public policy interests in competition law, are interesting questions that could only be considered to a very limited extent in this thesis. Thus, the practical implications and solutions would both constitute relevant and timely topics for further research.

As for the European school of thought, a central notion is that EU competition law is embedded in a framework that is fundamentally different from the Chicago school of thought. I studied EU competition law through its own, distinct school of thought, due to its unique characteristics. One of these characteristics is the *social market economy*: a system that combines a free market with social aspects, such as social equality and social fairness. The objective of establishing a social market economy in Article 3 TEU suggests that competition law should perhaps address societal concerns as well. This is partly supported by the view that competition law forms a

core part of the *micro-economic constitution*, which is a product of the social market economy. Admittedly, if we look at Article 3 TEU more broadly, it envisions the establishment of *a highly competitive* social market economy. In this regard I acknowledge that competition law is mainly about competition, and the suggested public policy considerations cannot undermine competition altogether.

The concept of the social market economy, together with Article 3 TEU and Articles 7 and 11 TFEU, suggest that the theoretical foundations for considering public policy interests in competition law exist. A further argument in support of this notion can be found from *theories of coherence*. Although total coherence is considered by some as challenging, or even impossible, I consider it to be worth pursuing. A comparison to another core element of the economic constitution, namely the *freedom of movement rights*, has shown that competition law is interpreted in a more isolated manner when it comes to public policy considerations. I consider it relevant to note that even in cases regarding the freedom of movement rights, a fundamental element of the European Union, public policy considerations may constitute an exception. Interpreting the two main elements of the micro-economic constitution consistently would contribute to total coherence.

Another perspective in my research was whether *consumer welfare* and the *fair share of the benefits* could be re-evaluated in light of the objectives expressed in Article 3 TEU. As consumer welfare has not been explicitly accepted as an objective by the ECJ, I find that it is all the more relevant to assess it. Sustainability is yet again a recent example of how competition rules may be interpreted in a more holistic manner. Interpreting the benefits received by the whole society as benefits that on the long run benefit individual consumers as well, is integral in order to accommodate truly *long-term concerns*, such as the climate change. I also considered *consumer well-being* as an alternative benchmark, which could capture a broader range of values than consumer welfare. Despite the practical difficulties it might pose, it is interesting to note that happiness research suggests a rather holistic approach to well-being, one that consists of mainly other than economic benefits.

To conclude, the question of public policy considerations in EU competition law is ultimately a question of including *fundamental values and objectives of the Union* in competition law and policy. It is a question of whether competition law should focus solely on the effects of certain conduct, or whether it should include broader considerations regarding the objectives of competition law, perhaps even the objectives of the Union. I believe that competition law could

serve other than solely economic objectives, partly because it seems somewhat unsustainable that competition law could be interpreted in total isolation from the rest of the EU law. I recognise that economic analysis has become an essential and useful tool for competition analysis, but it is relevant to consider whether the plurality of values and objectives in the EU could coexist with the effects-based approach.

A hybrid approach combining the effects-based approach and wider objectives of the Union would require substantial practical research to support these theoretical notions. A few practical notions can be made in this context. Accommodating public policy considerations in competition law is most likely clearer, when new rules or exceptions are created to address a certain area of public policy or a specific objective, such as sustainability. In this manner, competition rules do not have to include a "vague" notion of public policy considerations, the content of which might be unpredictable. Furthermore, the balancing of colliding interests, such as economic freedom and environmental protection, should be supported by guidelines or other measures which contribute to legal certainty and predictability.